Supreme Court U.S.
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No. _____

In The
Supreme Court of the United States

SANDRA KUCERA, SARAH THERESE WINDER, KRISTIN ZUBEL, NATALIE BOLTON, PHILLIP SALISBURY, SAMANTHA BERG, TIMOTHY JOHNSON and GREGORY KAFOURY,

Petitioners,

v.

BILL BRADBURY, Secretary of State, DEMOCRATIC PARTY OF OREGON, JOHN NEEL PENDER and JAMES EDMUNSON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oregon

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF LEGAL QUESTIONS PRESENTED ON REVIEW

1. Are the free speech or association, due process or equal protection rights, under the United States Constitution, of independent candidates for federal office violated, if state statutes (as interpreted by the highest court of the state) allow a state officer (Secretary of State) to disqualify voter signatures on nominating petitions for reasons that are not stated in any statute or in any published administrative rule or any other means of communication available to the candidates or their signature gatherers?

   A. May the state officer thus disqualify all voter signatures on a signature sheet, even after each voter signature has been verified as valid by affidavit of county officials:

      (1) Merely because the signature of the petition *circulator* is "illegible" or "appears to be initials," even though no published rules prohibit such circulator signatures?

      (2) Merely because the petition circulator attempted to correct any type of error or slip of the pen in affixing a date on her own signature on the petition?

   B. May the state officer thus permanently disqualify all county-verified valid voter signatures on a signature sheet, without providing (1) any notice to the petition circulator or to the candidate or his campaign that the sheet is being rejected, or (2) any reason for the rejection of any signature sheet, or (3) any opportunity for the petition circulator to cure the alleged defect by affidavit or otherwise?

STATEMENT OF LEGAL QUESTIONS PRESENTED ON REVIEW – Continued

C. May the state officer thus permanently disqualify all county-verified valid voter signatures on a signature sheet, with no notice or opportunity to cure, if the date on the petition circulator's signature is anything other than a one-time pristine flow of ink on paper, with no corrections whatever?

D. May the state officer discriminate against petition circulators who are not Oregon-registered voters by resurrecting some signature sheets on the basis of the voter registration card signatures on file only for those petition circulators who are Oregon-registered voters?

E. Do the above procedures not violate constitutional rights, if the state officer, after the signature gathering effort is well underway, sends an unpublished memorandum to county officials, calling upon them to apply the above-mentioned unpublished rules, when the memorandum is not adopted as a rule and is not disclosed to the public, to the candidate's campaign, or to the petition circulators?

F. May the state officer permanently disqualify voter signatures on all signature sheets submitted to county officials without sequential sheet numbering, when such requirement has never previously been enforced or was in fact waived by the responsible state officer?

2. Do any of these same circumstances violate the free speech or association, due process or equal protection rights of the candidates, where the state has not (1) articulated a compelling or important state interest for these procedures or (2) shown that its scheme is

STATEMENT OF LEGAL QUESTIONS PRESENTED ON REVIEW – Continued

narrowly tailored or even rationally related to such an interest, if it were to exist, for:

A. Discarding all signature sheets which do not conform to the state officer's unpublished "rules"; or

B. Discarding all signature sheets not sequentially numbered when submitted to county officials.

3. Do any of these same circumstances violate the free speech or association, due process or equal protection rights of (1) the petition circulators or (2) qualified voters who signed their valid and county-verified signatures on the later-discarded petition sheets?

4. Do any of these same circumstances violate the free speech or association, due process or equal protection rights of qualified voters who wish to cast votes for the independent candidates for federal office, particularly where state law does not allow write-in votes for such a candidate to be counted except in the extraordinary circumstance where the total write-in vote exceeds the vote for any candidate listed on the ballot?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption. Petitioners for Certiorari are individuals only and not corporations.

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CITATIONS TO REPORTS OF OPINIONS

The decision of the Oregon Supreme Court is *Kucera v. Bradbury*, 337 Or. 384, 97 P.3d 1191 (2004).

This Court's denial of the Application for Stay of Oregon Supreme Court Order, Pending Certiorari Review is *Kucera v. Bradbury*, 125 S.Ct. 27, 159 L.Ed.2d 855, 73 USLW 3204 (U.S. Sep. 28, 2004) (NO. 04A242).

BASIS FOR JURISDICTION

On September 22, 2004, The Oregon Supreme Court issued a Peremptory Writ of Mandamus, ordering the Marion County Circuit Court to vacate its order of September 9, 2004, ordering the Oregon Secretary of State to place the Nader/Kucera ticket on the Oregon ballot for President and Vice President of the United States. On September 23, 2004, the Oregon Supreme Court denied Plaintiffs' Petition for Stay and Reconsideration, thus ending all review of the matter by the courts of Oregon.

This Court has jurisdiction to hear this Writ of Certiorari under 28 U.S.C. § 1257(a). The Oregon statutes pertaining to verification of signatures on nominating petitions, as applied and interpreted by a final judgment of the Oregon Supreme Court, are repugnant to First, Fifth, and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED IN THE CASE

A. CONSTITUTIONAL PROVISIONS.

Plaintiffs (Petitioners herein) were deprived of their rights under the First and Fifth Amendments of the U.S. Constitution, made applicable to the states by the Fourteenth Amendment.

Article I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

> or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
>
> Article V.
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. STATUTES.

ORS 249.740 and ORS 249.008 are set forth in the Appendix.

2004 STATE CANDIDATE'S MANUAL: INDIVIDUAL ELECTORS [hereinafter the "MANUAL"] is a 19-page rule adopted by the Oregon Secretary of State to implement these statutes. The MANUAL states (p. 13):

> The circulator of the candidate nominating petition must sign the circulator's certification, stating that:
>
> > "I hereby certify every person who signed this sheet did so in my presence and I believe each person is a qualified voter of the state of Oregon."
>
> The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification.

STATEMENT OF FACTS

A. PROCEDURAL HISTORY OF THE CASE.

On September 2, 2004, the Oregon Secretary of State Bill Bradbury [hereinafter "Defendant" and Respondent herein] refused to certify the nomination of Ralph Nader to appear on the November 2, 2004, Oregon ballot as an independent candidate for President of the United States, although his supporters had submitted more that the number of signatures required. On September 3, 2004, Plaintiffs filed suit in Marion County Circuit Court for an order requiring Defendant to certify Nader's place on the ballot.[1] This suit included the federal questions sought to be reviewed, including three specific claims under the U.S. Constitution (the First, Fifth, and Seventh Claims for Relief).

On September 9, after a day of hearing with live witnesses, the presiding judge of the Marion County Circuit Court issued an Opinion and Order (set forth in the Appendix), which ruled for Plaintiffs on their Fourth Claim (based on Oregon statutes) and found such ruling to be "dispositive of the merits without reaching constitutional claims." The Court found that Nader had qualified for the ballot and ordered the Secretary of State to "order the preparation of ballots for President and Vice-President for the 2004 General Election which contain the names of Ralph Nader and Sandra Kucera as independent candidates for President and Vice-President." General Judgment, ER-115.[2]

On September 22, the Oregon Supreme Court issued a Peremptory Writ of Mandamus, ordering the Marion County Circuit Court to vacate its order of September 9. The court's opinion addressed all of the federal constitutional issues

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[1] Unless otherwise stated, all date references are to dates in 2004.

[2] ER refers to the Excerpts of Record filed with the Oregon Supreme Court and transmitted to this Court with the Application for Stay of Oregon Supreme Court Order, Pending Certiorari Review, which was filed September 24, 2004. SER refers to the Supplemental Excerpts of Record, similarly filed.

raised by Plaintiffs in less than two pages: *Kucera v. Bradbury*, 337 Or. 384, 97 P.3d 1191, 1204 (2004) (App. 30). On September 23, the Oregon Supreme Court summarily denied Plaintiffs' Petition for Stay and Reconsideration, thus ending all review of the matter by the courts of Oregon.

While the Oregon 2004 ballot did not include the Nader/Kucera ticket, this matter is within this Court's jurisdiction as capable of repetition yet evading review. *Norman v. Reed*, 502 U.S. 279, 287-88, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 784, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), stated: *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979); *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975) (per curiam); *Dunn v. Blumstein*, 405 U.S. 330, 333 n. 2, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); *Storer v. Brown*, 415 U.S. 724, 737, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). Without review by this Court, future candidates for federal office, including Nader if he runs again, will be subject to the same unconstitutional treatment as was afforded the Nader/Kucera ticket here.

B. UNDERLYING FACTS OF THE CASE.

In August 2004, supporters of the Nader/Kucera ticket ("Nader Campaign") filed thousands of signature sheets with the county election officers ("counties") charged with verifying the voter signatures and returning the originals of the signature sheets to the Campaign (with their affidavits affixed to each sheet). The Campaign then submitted the verified original sheets to the Defendant by the August 24 filing deadline for placement on the November ballot.

Of the sheets containing over 27,000 signatures submitted to the counties, the counties returned to the Nader Campaign signature sheets with 18,186 voter signatures individually found to be valid. Every signature sheet is also an affidavit of the county elections officer,

who signs every sheet after specifying the number of valid, verified voter signatures on that sheet.[3]

During the county-level verification process, the Defendant sent an informal ("Hi Everyone") memo, to the county elections officers (dated August 4[4]), with instructions on how to handle the Nader petitions. Excerpt of Record submitted (by Defendant) to the Oregon Supreme Court [hereinafter "ER"] ER-92 *et seq*. We shall refer to this memo as the "Unpublished Instructions." These were not provided to the Nader Campaign or to the public but were internal memoranda of the State of Oregon.

The Unpublished Instructions directed the counties to remove sheets, and not verify the voter ("elector") signatures thereon, if the signature of the circulator did not meet the criteria listed in the Unpublished Instructions.[5] The counties then removed hundreds of signature sheets from the verification process and did not return those sheets to the Nader Campaign.[6] The instructions most

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[3] Each signature sheet is a sworn, dated affidavit by a county elections officer, that the specified number of voter signatures on the sheet are valid. ORS 249.008(1).

[4] We note that the "Hi Everyone" memo itself [ER-93-94] is undated and is in Times Roman typeface. The cover email for it is in Arial typeface and was unknown to Plaintiffs prior to the date of trial.

[5] Defendant later admitted, in a memorandum to the Oregon Supreme Court, that addressing the validity of the circulator's signature was beyond the authority of the counties. Defendant's Mandamus Memorandum to the Oregon Supreme Court (p. 6) stated:

> Notably, the matters examined by county officials is extremely limited: They simply "compare the signatures of electors on the petition or minutes with the signatures of the electors or the elector registration cards." ORS 249.006 [sic; should be 249.008]. The certification states the number of signatures believed to be genuine.

[6] The Unpublished Instructions direct the counties to "not return any signature sheets to the Nader Campaign that may have potential problems until the Secretary of State has resolved these issues and notified the county." The counties are instructed to return to the Nader Campaign only "the original sheets with the counties certification," which means those sheets that were not rejected for "potential problems

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harmful to the Nader Campaign were those to reject entire sheets, if:

> (1) "Circulator signature has signed using initials only."
>
> (2) "Circulator date has been crossed out or modified."

The Unpublished Instructions required rejection of entire sheets, if the circulator's signature "appeared to be initials," even if that was the circulator's normal way of signing. This was not a question of identifying the circulator, because every signature sheet contained the printed name of the circulator under her signature. There are no Oregon statutes or rules pertaining to candidate petitions requiring that circulator signatures must not consist of initials.

Nor are there Oregon statutes or rules requiring that every date applied to a circulator's signature be a pristine flow of ink on paper, with no corrections. The Unpublished Instructions directed the counties to disqualify entire sheets of voter signatures, if the circulator had made any slip of the pen in writing the date on her own signature (such as beginning to write a "7" for July and, realizing the month had changed, crossing it out and replacing it with an "8" for August).

Neither the Defendant nor the counties notified the Nader Campaign that the sheets signed by any circulator were being rejected during the county-level verification process. Thus, there was no opportunity for the Campaign to contest those rejections by, for example, producing the circulator in person or by affidavit with signature exemplars (on a driver's license, passport, W-4 form, etc.) to show that the rejected circulator signature was indeed a signature of that circulator. Nor was there any means to "uncorrect" any corrected date on a circulator signature.

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with circulator signature and dating of signature of sheets." In practice, as indicated in the Affidavit of Travis Diskin (SER-29), the counties did not return the rejected sheets to the Nader Campaign, until after the August 24 deadline for filing the sheets with the Secretary of State.

The counties returned the rest of the verified signature sheets to the Nader Campaign, complete with their own affidavits attesting to the number of valid signatures on each sheet, which the Nader Campaign submitted to Defendant on August 24. Defendant announced that the number of valid, verified signatures submitted was 18,186, which was 2,880 more than the needed number. Suddenly, on September 1, Defendant called a press conference (where the representative of the Nader Campaign was physically excluded from the room) and announced that Nader had fallen 218 signatures short, because Defendant had himself rejected additional sheets containing over 3,000 verified voter signatures. **Despite repeated requests, Defendant provided no documents to the Nader Campaign stating why any rejected signature sheet was rejected.**

On September 2, the Nader Campaign received a 1-page telecopied letter from Defendant, stating that the number of valid signatures counted by the Secretary of State was 15,088 (Exhibit A to the Appeal/Petition), which is 218 fewer than the 15,306 required. Just prior to trial, Plaintiffs received a half-page summary of sheets that were rejected by the Defendant because they had not been sequentially numbered by the Nader Campaign prior to submittal to the counties. Those Defendant-rejected sheets contained 2,354 verified voter signatures. The half-page summary also noted "other rejections" by Defendant of sheets containing 718 verified voter signatures. Plaintiffs read in the press that these signatures were contained on sheets which Defendant had rejected for some perceived deficiency in the circulator's signature or the date accompanying the circulator's signature. Defendant did not identify any reason for rejecting any individual sheet, apart from the lack of sequential numbering.

Defendant provided no notice or opportunity for the Nader Campaign (or anyone else) to cure the alleged problems with the signature sheets. Instead, on the basis his application of unwritten rules, Defendant merely declared that Nader had not qualified for the ballot.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Allowance of the writ is warranted under SCR 10(c), as the Oregon Supreme Court has decided important federal constitutional questions in a way that conflicts with relevant decisions of this Court.

Plaintiffs' Fifth and Seventh Claims (ER-14-16) sought relief for violations of Plaintiffs' rights under the First, Fifth, and Fourteenth Amendments of the U.S. Constitution. The trial court did not reach these claims, having granted the relief sought on the basis of one of Plaintiffs' statutory claims. The Oregon Supreme Court addressed the Fifth and Seventh Claims and summarily denied them. *Kucera v. Bradbury*, 337 Or. 384, 97 P.3d 1191, 1204 (2004) (App. 30).

I. BY IMPOSING UNWRITTEN RULES TO REJECT SIGNATURE SHEETS, DEFENDANT VIOLATED THE RIGHTS OF PLAINTIFFS UNDER THE FIRST AND FIFTH AMENDMENTS TO NOMINATE A CANDIDATE PURSUANT TO THE APPLICABLE PUBLISHED ELECTION STATUTES AND RULES.

Defendant rejected, by means of his "unwritten rules," far more than enough verified voter signatures (at least 718) than the shortfall of 218 signatures. The Oregon Supreme Court concluded that application of the "unwritten rules" did not violate Oregon law. Plaintiffs contend that the application of "unwritten rules" did violate their rights under the U.S. Constitution by depriving them of a recognized liberty interest with no notice and no opportunity to cure the alleged "circulator errors" on the signature sheets.

A. DEFENDANT REJECTED SIGNATURE SHEETS ON THE BASIS OF HIS UNWRITTEN RULES.

The trial court found that the Nader/Kucera ticket was denied ballot access by Defendant's creation and

application of unwritten rules which rejected sheets containing at least 718 valid and verified voter signatures. These are in addition to the unknown number of voter signatures on sheets that were rejected and then retained by the counties, at the direction of Defendant, due to Defendant's perception of alleged "errors" by the circulators.

The Oregon Supreme Court did not disagree:

> The trial court determined that the signature and date review procedures that Lindback had followed in his office were "unwritten rules," that they were "not supported by the written administrative rules as set forth in the Manual," that they were "inconsistent with ORS 247.005" and "the prior policy of the Elections Division" as stated in *Nelson*, and that they "were not applied either uniformly or consistently in actual practice."
>
> **It is true that the review procedures that** [Defendant's director of elections] **Lindback described were not themselves written, but that does not render them unlawful.**

97 P.3d at 1200 (App. 21) (emphasis added). Thus, the Oregon Supreme Court recognized that Defendant used unwritten rules to disqualify the sheets.

1. SHEETS WITH NO DISCERNIBLE DATING ERRORS.

Defendant rejected sheets containing several hundred signatures, which have no conceivable errors or corrections to the date on the circulator's signature. The trial proceeded on Plaintiffs' uncontested assumption that the sheets were rejected solely because Defendant did not like the appearance of the circulator's signature.

The Affidavit of Travis Diskin (SER-28) attached as exhibits hundreds of rejected signature sheets. Defendant provided no ruling and no rationale for rejection of any of these circulator signatures. Various Plaintiffs and other

circulators provided affidavits confirming the validity of their signatures as circulators.[7]

The state's largest county, Multnomah, at instruction of Defendant, disqualified hundreds of signature sheets on this basis. Had Plaintiffs been notified that circulator signatures were somehow "questionable," they would have provided to the county elections officer the circulator himself or his (or her) signature exemplars during the county verification period. Plaintiffs do not know whether other counties also "pulled" and did not verify sheets at the direction of Defendant, who never answered Plaintiffs' timely request for production on this subject.[8]

The trial court concluded that the marks by the rejected circulators qualified as "signatures" and therefore met the requirements of Defendant's published rules for nominating petitions, which are contained in the 2004 STATE CANDIDATE'S MANUAL: INDIVIDUAL ELECTORS [ER-71 *et seq.*] [hereinafter the "MANUAL"].[9] The only requirement

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[7] All affidavits filed by Plaintiffs in trial court were not contested by Defendant.

[8] Defendant has never responded to Plaintiffs' attempts to obtain documents showing why each sheet was rejected. Prior to the trial court hearing, Plaintiffs requested production of:

> 4. All documents demonstrating the reason why each Nader/ Kucera nominating petition signature sheet rejected by the Secretary of State was rejected.

Prior to trial court judgment, Plaintiffs requested production of:

> 8. All other documents indicating why each Nader nomination signature sheet rejected by Defendant was rejected.
>
> 9. A complete listing of all Nader nomination signature sheets in every county that were not verified by the county elections officers due to circulator "issues," as stated by John Lindback at the court hearing on September 8, 2004, the reason why each sheet was not verified, and who directed that the sheet not be verified (Secretary of State or local decision of county elections officer).

[9] That MANUAL declares itself to be a "comprehensive overview of the candidate filing process" and to provide "the procedures and regulations necessary to file for office." ER-76. It was reasonable for the

(Continued on following page)

pertaining to circulator signatures in the MANUAL [ER-86] is this:

> The circulator of the candidate nominating petition must sign the circulator's certification, stating that:
>
> > "I hereby certify every person who signed this sheet did so in my presence and I believe each person is a qualified voter of the state of Oregon."
>
> The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification.

BLACK'S LAW DICTIONARY (8th ed. 2004) defines "signature" as:

> 1. A person's name or mark written by that person or at the person's direction. [citations omitted]

The marks made by the rejected circulators listed above certainly qualify as "signatures," even without their affidavits of authenticity. These affidavits were provided as soon as Defendant provided any notice to the Nader Campaign that there was any problem with these signature sheets at all.[10]

2. TRIVIAL DATE CORRECTIONS WHERE THE INTENTION OF THE CIRCULATOR IS MANIFESTLY CLEAR.

Defendant also rejected sheets due to the way the circulator dated his or her signature or corrected such

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Nader Campaign to rely upon this "comprehensive" MANUAL. The full document is available at http://www.sos.state.or.us/elections/manuals/indiv.pdf. The Oregon Supreme Court opinion refers to it as the SCMIE.

[10] References to the hearing video record are to the timestamps embedded in it. Plaintiffs furnished the full DVD of the trial court hearing to this Court with their Application for Stay pending Petition for Certiorari.

date. The Affidavit of Travis Diskin. Ex. E and Ex. K, presented a bundle of signature sheets for which Plaintiffs were never given a reason for rejection or notice or opportunity to cure. Plaintiffs discerned no reason for rejection, other than the appearance of the date or the attempt by the circulator to correct the date next to his or her signature.

The trial court concluded that the MANUAL contains only one applicable dating requirement:

> The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification.

Id., p. 13. The rejected signature sheets complied with this dating requirement.

There is no requirement in any statute or rule that all dates on circulator signatures be pristine. There is no published rule against dates that are corrected.

3. THE TRIAL COURT'S DECISION CONCLUDED THAT DEFENDANT APPLIED "UNWRITTEN RULES" TO DISQUALIFY THE NADER PETITIONS.

The trial court concluded that Defendant had violated Oregon statutes and his own rules in rejecting these signatures. ER-107 *et seq*. The Oregon Supreme Court ruled otherwise but did not contradict the trial court's findings that Defendant rejected the signature sheets pursuant to "unwritten rules" that were not available to Plaintiffs.

The trial court concluded (App. 38-39):

> These unwritten rules, however longstanding, are not supported by the written administrative rules as set forth in the Manual, and they are inconsistent with ORS 247.005, as well as with the prior policy of the Elections Division as set forth above. Additionally, it was obvious from

> the testimony of Mr. Lindback that the Secretary's unwritten rules were not applied either uniformly or consistently in actual practice.

The trial court (App. 40) also concluded that Defendant acted contrary to statute and his written rules in instructing counties to remove sheets from the verification process, based upon alleged "circulator problems."

> However, these instructions are inconsistent with both the state elections policy established by the Legislature in ORS 247.005, and with the Secretary's own written rules as set forth in the MANUAL, as well as with the Secretary's policy position set forth in *Nelson v. Keisling*.

Defendant then excluded yet more hundreds of sheets for alleged "circulator problems," after those sheets had been verified by the counties and delivered to Defendant on August 24. The court found "no statutory or administrative rule authority for that novel action by the Secretary at the post-verification stage."

The court (App. 41) concluded (emphasis added):

> It is not disputed by the Secretary that if the elector signature sheets that had been verified by county clerks and certified to the Secretary had not been disallowed by the Secretary, the Nader campaign would have had more than enough "Verified signature sheets with the sufficient number of signatures," as required by the administrative rules as set forth in the Manual. And many more additional signature petitions were never even processed for verification at the counties because of the Secretary's instructions in August, 2004 to scrutinize for circulator certification "issues" before verifying elector signatures on the Nader nominating petitions. **Neither action was authorized by administrative rule or statute, and each was inconsistent with both the state elections policy as established by the Legislature, ORS 247.005, and**

with the prior policy of the Secretary of State as expressed *Nelson v. Keisling, supra.*

But the Oregon Supreme Court held that Defendant could disqualify the sheets pursuant to unwritten and undisclosed "rules," never adopted as rules by Defendant.

4. THE UNWRITTEN RULES WERE NOT ADOPTED BY ANY RULE MAKING PROCEDURE.

Some of the "unwritten rules" were contained in the Unpublished Instructions (dated August 4). Others were not written anywhere. For example, at trial it was established that Defendant had rejected sheets because the circulator's signature was not "legible." That requirement is not written.

The Oregon Supreme Court concluded that Defendant was only "interpreting" his rules. Under this approach, Defendant could reject all signatures on a sheet, using an "unwritten rule" that the circulator failed to sign with his full name, including middle name or middle initial (as was done in Chicago in the 1960s, discussed *infra*). Applying such an "interpretation" of "signature" would invalidate nearly all signature sheets.

5. THE UNWRITTEN RULES WERE INCONSISTENT WITH THE PUBLISHED RULES.

a. SHEETS REJECTED DUE TO THE LOOK OF THE CIRCULATOR'S SIGNATURE.

Defendant claims that it was fine to discard all sheets signed by a circulator, if that circulator's signature "appears to be initials." But this is not a rule applicable to candidate nominating petitions and is not contained in the MANUAL at all. As noted by the trial court (App. 37):

> Specifically, the only additional requirements for petition circulators are two: "The circulator of

> the candidate nominating petition must sign the circulator's certification. . . . " And "The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification."

There is no requirement that the circulator's signature meet some *ad hoc*, undisclosed and subjective test, such as that admittedly applied by Defendant. There is no statute or rule that a signature be "legible." Many are not. The signature of Multnomah County Deputy District Attorney Norm Frink (see SER-382) is not "legible" as it does not appear to spell out his name. Even though his "illegible" signature is sufficient to sign a criminal indictment, it did not satisfy Defendant's subjective taste. Nor did Defendant ever notify Mr. Frink or the Nader Campaign that Mr. Frink's signature was in any way defective.

Further, every sheet also shows the printed name of the circulator, below his or her signature, thus obviating any possible concern for legibility. And, since any human being can lawfully circulate a petition in Oregon (following repeal by the 1999 Legislature of all qualifications for circulators), the only relevant question about a circulator's signature is whether the mark was made by a human being.

The MANUAL states that the circulator "must sign the circulator's certification," which all of them did. Defendant claimed authority to adopt a new definition of "sign" to mean sign in a particular manner (i.e., with a mark that is "legible" and does not "appear to be initials"). This definition is contained in no statute and in no rule. It is contrary to the plain meaning of the term "sign" or "signature." BLACK'S LAW DICTIONARY, cited above, defines it as a "name or mark." The AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) defines it as "One's name as written by oneself."

The uncontested testimony at trial was that Respondent rejected 318 verified voter signatures on sheets signed by the named circulators, only because their

signatures "appeared to be initials," even though every one of them submitted sworn affidavits showing that what "appeared to be initials" was in fact their normal signatures on important documents, such as drivers licenses and Social Security cards.

6. THE OREGON SUPREME COURT DECISION RECOGNIZED THAT DEFENDANT HAD APPLIED "UNWRITTEN RULES" TO DISQUALIFY THE NADER PETITIONS.

The Oregon Supreme Court decision conceded that Defendant's actions were taken pursuant to "unwritten rules," although it found that doing so was not contrary to Oregon law. The Court stated:

> It is true that the review procedures that Lindback described were not themselves written, but that does not render them unlawful.

97 P.3d at 1200 (App. 21). The Oregon Supreme Court identified no statute or published rule containing the requirements that Defendant used to reject the Nader petitions.[11]

B. THE U.S. CONSTITUTION DOES NOT ALLOW STATES TO DENY BALLOT ACCESS PURSUANT TO UNWRITTEN RULES.

Citizens are entitled to rely on published laws and rules in nominating candidates for President. The "liberty" protected from state impairment by the due process clause of the Fourteenth Amendment includes the freedoms of speech and association guaranteed by the First Amendment; these First Amendment freedoms extend to political

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[11] The Court also appeared to believe that the "written instructions to the county clerks" were somehow public. The trial court is clear that they were not; they were provided only to the county clerks and not to the public or to the Nader Campaign.

activities such as running for elective office; and state election practices must therefore serve legitimate state interests "narrowly and fairly to avoid obstructing and diluting these fundamental liberties." *Duncan v. Poythress,* 657 F.2d 691, 702 (5th Cir. 1981); quoting with approval, *Smith v. Cherry*, 489 F.2d 1098, 1100 (7th Cir. 1973), *cert. denied*, 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974); *Briscoe v. Kusper*, 435 F.2d 1046, 1052-54 (7th Cir. 1970). Procedural due process is violated when an election authority, by a change in policy or course of conduct, actively misleads candidates or voters. *Id.*, 435 F.2d at 1055 (election commissioners could not apply "new * * * rule to nullify previously acceptable signatures without prior notice").

Briscoe offers facts and procedural due process violations strikingly similar to the present case. The Chicago Board of Election Commissioners imposed new and complex ballot placement procedures for candidate nominating petitions in contests for alderman, without notice, and refused the candidates an adequate opportunity to examine disqualified petitions. Both failures impaired liberty interests protected by the Due Process Clause of the Fourteenth Amendment. Here, Defendant disqualified scores of signatures based upon the new and *ad hoc* changes which were either written nowhere or only in the Unpublished Instructions sent to the counties by Defendant in August 2004, also issued without notice to Petitioners, the Nader Campaign, or the public.

The Seventh Circuit held that such tactics were "fundamentally inimical to due process."

> [T]he application of the new anti-duplication rule to nullify previously acceptable signatures without prior notice was unfair and violated due process. . . . The Board may not deviate from such prior rules of decision on the applicability of a fundamental directive without announcing in advance its change in policy. This is especially

> true where, as here, fundamental, constitutionally protected liberties are adversely affected, and those interested require certain knowledge of what is expected of them by the state. Until such time as the Board makes public its new determination, it is constitutionally prohibited from imposing that rule on unsuspecting persons.

Id. at 1055. The Court then turned to the new interpretation of the "proper" signing rule requiring a full name with middle initial and no nicknames.

> Nothing in the statutory language suggests that such a restrictive interpretation was necessary or would be readily understood by the general public.
>
> * * * [S]uch a rigid and technical interpretation by the Board may not be imposed in the absence of pre-existing regulations forewarning candidates. [citations omitted] Lacking such advance clarification, we conclude that the Constitution permits enforcement of the statutory rule in only the least restrictive and most obvious manner.

Id. at 1055-56. The Court summarized the election officers' conduct:

> The sum of these practices meant that petitions' signatures were disqualified for obscure or unknown reasons on the basis of evidence unavailable to the parties and without the opportunity of effective response by those adversely affected by the checkers' investigations.

Id. Here, Defendant disqualified entire sheets of verified voter signatures, with no notice to the voters, circulators, or the Nader Campaign, on grounds that were not stated in writing or any other manner available to the public or to the campaign.

In *Williams v. Sclafani,* 444 F.Supp. 906, 912 (S.D.N.Y. 1978), *aff'd*, 580 F.2d 1046 (2d Cir. 1978) the candidate had been informed that a person who registered

to vote on the street could also simultaneously sign his petition. After the candidate submitted his petitions, the Board changed its position. 444 F.Supp. at 912. The Court held the advice was a custom or practice, which induced justifiable reliance, and could not be departed from without giving prior notice to potential candidates and voters. *Id.*

Here, Plaintiffs relied upon the actual written rules and suffered from the same unfair and unconstitutional conduct – no notice of what a "signature" must look like; an irrebuttable presumption that any attempt to correct a date on a circulator's signature indicates fraud; no "findings" to support why a petition sheet was invalid; no opportunity to appeal or rebut such findings; and no access to basic evidence.

Here, Defendant provided no notice regarding his application of his "unwritten rules" but, as fully established by the trial court record, rejected hundreds of signature sheets because the circulator signatures were "illegible" or were "initials," without ever notifying the Nader Campaign or allowing them to provide any exemplars of that circulator's signature.

II. EVEN IF THE UNWRITTEN RULES HAD BEEN WRITTEN, DEFENDANT SHOWED NO COMPELLING OR EVEN IMPORTANT STATE INTEREST IN IMPLEMENTING THOSE RULES.

The implementation of a rule which disqualifies voter signatures on a nominating petition on the basis of alleged (or proven) errors by circulators (in signing, dating, or placing numbers upon the sheets) significantly burdens the collection of signatures by precluding from the verification process, without an exacting standard of compelling justification, thousands of signatures. This violates Plaintiffs' rights under the First and Fifth Amendments to the U.S. Constitution, applicable to the states by the Fourteenth Amendment.

A. STATE IMPAIRMENT OF THE EXERCISE OF FRANCHISE RIGHTS REQUIRES A SHOWING THAT IT ACHIEVES AT LEAST AN IMPORTANT STATE INTEREST.

This Court requires that burdens on the process of qualifying candidates for the federal ballot be justified by a scheme narrowly tailored to achieve a compelling state interest (know as "exacting scrutiny"). *Anderson v. Celebrezze*, 460 U.S. 780, 786-88 (1983). The Court concluded that the state must offer sufficient justification for each of the burdens imposed by its rules.

> It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. [Citations omitted].

460 U.S. at 789-90.

Here, the Oregon Supreme Court did no such analysis, and Defendant proffered no credible state interest and failed to address at all whether his system is narrowly tailored to achieve any legitimate interest. What is the state interest in applying unwritten rules to reject signature sheets because the Defendant does not like the look of the circulator's signature or because the date is corrected in any way? It is the burden of the state to offer and prove such justifications. *McCarthy v. Secretary of the Commonwealth*, 359 N.E.2d 291, 294 (Mass. 1977).

B. STATE ACTIONS IMPAIRING THE NOMINATION OF CANDIDATES BY MEANS OF PETITIONING MUST BE NARROWLY TAILORED TO ACHIEVE A COMPELLING STATE INTEREST.

In the years after *Anderson v. Celebrezze*, this Court adopted even higher constitutional protection for the political aims of persons gathering signatures on petitions, holding that the First Amendment protects the rights of petitioners to communicate with voters. *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999) [hereinafter *"ACLF"*]; *Meyer v. Grant*, 486 U.S. 414, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988). Such communication from petitioners to voters is the most highly protected speech and can be restricted only by means "narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776-777, 98 S.Ct. 1407, 1415-1416, 55 L.Ed.2d 707 (1978).

Here, all of the restrictions applied by Defendant similarly impair the First Amendment rights of Plaintiffs. This is particularly true for those seeking to appear on the ballot for President and Vice-President, as the U.S. Constitution precludes the use of write-in votes (since technically all votes are cast for the "electors" to the electoral college). *Williams v. Rhodes, supra*, 393 U.S. 23, 37, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). Further, Oregon law does not allow write-in votes to be counted at all, unless all write-ins for a particular office receive more votes than any candidate. ORS 254.500.

In Oregon, being a registered voter carries two basic rights – the right to vote and the right to sign petitions. Both are fundamental rights which cannot be impaired by government actions, without a narrowly tailored approach to achieving a compelling state interest.

> Indeed, the Supreme Court has recognized that initiatives and elections for public office are the only two means by which "voters can assert their preferences," and laws that operate to restrict ballot access implicate the right to vote. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979) (internal quotation marks omitted).

Molinari v. Powers, 82 F.Supp.2d 57, 76 (E.D.N.Y. 2000)

Further, the right to petition government for redress of grievances must mean that the petitioning process does not confront potential and actual signors with the prospect of having their signatures on petitions invalidated, regardless of the correctness of their actions in signing, because of trivial "errors" by circulators. Electors signing petitions are engaging in core political speech to the wider public by placing upon the ballot, for the consideration of all electors, their candidates.

Here, each Plaintiff elector is being denied the right to effectively sign petitions of choice by the "unwritten rules" of the Defendant. Even if these rules had been written, these policies deprive the signor of any assurance that her valid signature will be counted, because he is disqualifying entire sheets of *elector* signatures on bases that have nothing to do with their validity.

C. DEFENDANT HAS NOT SHOWN AN IMPORTANT OR COMPELLING STATE INTEREST IN REJECTING SIGNATURE SHEETS FOR "ILLEGIBLE" CIRCULATOR SIGNATURES (NEXT TO LEGIBLE PRINTED NAMES) OR CIRCULATOR SIGNATURES THAT "APPEAR TO BE INITIALS."

Defendant sought to defend his policies on generic grounds that he has "an obligation to prevent fraud in

elections" but failed to identify any sort of fraud that is prevented by his actions.

In addition, Defendant's conduct in instructing the counties to "pull out" and not verify signature sheets from certain circulators, because the circulator's signature is "illegible" or "appears to be initials," also violated due process rights. This allowed the Nader Campaign to continue to submit hundreds of signature sheets, containing over 500 signatures, collected by these "secretly banned" circulators. No government official notified the Nader Campaign of this ban, thus precluding the simple step of the filing of affidavits with the counties to remedy any perceived "problem" with the circulator's signature.

D. DEFENDANT HAS NOT SHOWN AN IMPORTANT OR COMPELLING STATE INTEREST IN REJECTING SIGNATURE SHEETS DUE TO THE CORRECTION OF TRIVIAL DATING ERRORS ON CIRCULATOR SIGNATURES.

What fraud is prevented by inconsistently applying an unwritten rule that, if a circulator begins to write an incorrect date on his own signature, there is then nothing he can do to avoid having all of the valid voter signatures on that sheet permanently disqualified? If he in any way corrects the date, Defendant throws away the sheet. Even if he completely crosses out the date, puts in the correct date and again signs the petition as circulator, Defendant throws away the sheet.

III. REJECTING CIRCULATOR SIGNATURES UNLESS THEY MATCH THE SIGNATURES UPON OREGON VOTER REGISTRATION CARDS VIOLATES THE DUE PROCESS AND FREEDOM OF TRAVEL GUARANTEES OF OUT-OF-STATE CIRCULATORS.

Defendant's "unwritten rules" also discriminated against circulators who were not registered voters of

Oregon. If Defendant found the circulator's signature "illegible" or "appears to be initials," he sometimes checked to see whether his Oregon voter registration card showed a similar signature. Otherwise, Defendant merely discarded all the verified voter signatures that the circulator had collected.

This "policy" of Defendant violates the rights of Plaintiffs who were circulators (but not registered to vote in Oregon) to participate in the nominating petition process without burdens on their right to travel across state lines and to engage in core political speech. It also violates their First Amendment rights and impermissibly discriminates against Oregon residents who are not registered to vote. *ACLF*, *supra*.

Defendant's apparent practice seeks to evade the edict in *ACLF* that a state cannot restrict the gathering of signatures on petitions to registered voters of the state. By resurrecting circulator signatures only if they match an Oregon voter registration card, Defendant is violating *ACLF*.

IV. THE WRITTEN RULES PERTAINING TO THE SEQUENTIAL NUMBER OF SIGNATURE SHEETS BY THE PETITIONER DO NOT SURVIVE STRICT SCRUTINY OR ANY LOWER LEVEL OF SCRUTINY.

A. DEFENDANT REJECTED SHEETS WITH 2,354 VALID SIGNATURES MERELY BECAUSE THE NADER CAMPAIGN DID NOT APPLY SEQUENTIAL NUMBERS TO ALL OF THE SHEETS.

Defendant rejected 1,062 sheets containing 2,354 valid and verified voter signatures on the ground that the sheets, when submitted to the counties, were not sequentially numbered. This rejection violates Plaintiffs' rights under the First and Fifth Amendments.

First, the Nader Campaign had submitted all signature sheets to the counties sequentially numbered, until they were advised by Office of the Secretary of State to begin submitting signature sheets to various counties with no initial numbering on those sheets. See Affidavit of Travis Diskin [SER-28]. Second, the counties accepted and validated all of the non-numbered sheets and themselves placed numbers on many of the sheets. Third, Defendant offered no compelling or even important or even plausible state interest that is achieved by rejecting signature sheets that are not sequentially numbered by the petitioners.

As stated in the Affidavit of Travis Diskin, the Nader Campaign was complying with the only legal requirement for the sequential numbering of the signature sheets, which is contained in the MANUAL, p. 4, which states:

> Within each individual county, sequentially number each signature sheet in the space provided; and
>
> Submit signature sheets to the appropriate county elections offices for verification * * *

The Nader Campaign did this, until very late in the petitioning effort, when they learned that the Defendant was directing some of the counties to "pull out" and reject an unknown number of signature sheets. Out of an abundance of caution, the Nader Campaign wished to submit the signature sheets to the Defendant with sequential numbering within each county packet, with no "gaps" in the numbers. This is not required by any law or any rule, but the Nader Campaign wished to avoid giving the Defendant any possible reason to reject the signature sheets.

Representatives of the Nader Campaign sought advice from the Defendant so that the Nader Campaign could avoid or fill the "gaps" in the county-by-county sequential numbering system. As shown by Travis Diskin's contemporaneous notes of the phone call [SER-32], Defendant's office staff advised him that the Nader Campaign should

submit additional completed signature sheets to the counties without sheet numbers at all, so that the sequential numbering system could be restored by plugging the new, non-numbered verified sheets into the "gaps" created by Defendant's direction to counties that they "pull out" signature sheets from the original sequence.

There is nothing in statute or rules applicable to nominating petitions that failing to number the sheets disqualifies all signatures on those sheets. In fact, the only warning applicable to circulators in the MANUAL (p. 13) is this:

> Warning: Violations of the circulator requirements may result in conviction of a felony with a fine of up to $100,000 and/or prison for up to five years.

Nor did Defendant contend that he had ever disqualified before a signature sheet on a candidate nominating petition on this basis.

Further, such inconsequential petition deficiencies are not disqualifying. *Stern v. Board of Elections*, 237 N.E.2d 313, 14 Ohio St.2d 175 (1968). Illinois laws required sequential page numbering of candidate nomination petition sheets. In *Stevenson v. County Officers Electoral Board*, 58 Ill.App.3d 24, 26, 15 Ill.Dec. 571, 373 N.E.2d 1043 (1978), the court held that a candidate's failure to number the pages of his 48-page nominating petition was a mere technical violation of the Election Code and not disqualifying.[12]

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[12] Courts in some states avoid constitutional issues by applying a "substantial compliance" rule to requirements such as the numbering of petition sheets, even where such requirements are mandatory. *Turner v. Lawley*, 305 N.Y.S. 357 (NY 1969).

B. DEFENDANT VIOLATED THE RIGHTS OF PLAINTIFFS' IN REJECTING SIGNATURE SHEETS FOR LACK OF NADER-APPLIED SEQUENTIAL NUMBERING.

Here, the Nader Campaign was complying with the sequential numbering requirement, until advised by Defendant's employee not to do so. The Nader Campaign had utterly no reason to stop complying, apart from the advice received from Defendant's office.

Independently, Plaintiffs' rights were violated by imposition of a sequential numbering requirement for which Defendant offered no compelling or even important state interest. At trial, John Lindback admitted that the counties themselves had placed numbers on the signature sheets that the campaign had filed with the counties without numbers. Hearing 11:47.03. In fact, he testified, "We did not know who had numbered what." Hearing 11:49:48 This admission precludes Defendant's implicit finding that the Nader Campaign did not number a certain number of sheets submitted to the counties. When asked by the trial judge whether Defendant had previously accepted such petitions with sheet numbers placed by the county officials, Lindback could not recall that issue ever coming up in the past. 12:06:45.

The counties had no problem with verifying the signatures on sheets, with or without Nader-applied sheet numbers, and in fact verified 2,354 signatures on those petitions. Defendant had no reason to insist on Nader-applied sheet numbers on all of the sheets submitted to Defendant, particularly since the counties had already put their own numbers on the sheets and since every sheet was also an original affidavit signed by a county official.

That Defendant allowed the counties to continue to accept, without objection, non-numbered signature sheets and entirely failed to notify the Nader Campaign that such sheets would later be rejected, violated Plaintiffs' rights to due process notice prior to the deprivation of a protected

liberty interest. *Bell v. Burson*, 402 U.S. 535, 542, 91 S.Ct. 1586, 1591, 29 L.Ed.2d 90 (1971); *Fuentes v. Shevin*, 407 U.S. 67, 82, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1983).

There is no question that the rights to be nominated for federal office and to circulate and collect signatures on nominating petitions involve fundamental liberty interests which require notice and opportunity to contest prior to deprivation.

V. DISCARDING VALID, VERIFIED VOTER SIGNATURES DUE TO ALLEGED "ERRORS" BY A CIRCULATOR DENIES VOTERS EQUAL PROTECTION UNDER THE LAW.

The Equal Protection clause of the Fourteenth Amendment requires that similarly situated people be treated alike. *City of Cleburne v. Cleburne Living Center,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). It generally "protects citizens from arbitrary or irrational state action." *Batra v. Board of Regents of the Univ. of Nebraska,* 79 F.3d 717, 721 (8th Cir.1996).[13]

Here, Defendant discarded over 3,000 voter signatures already verified as valid by counties. The disqualified voters were all duly registered Oregon voters. Yet, a minimum of 3,072 of those voters (718 plus 2,354) lost their rights to express their political views because of alleged minor circulator errors totally unrelated to any conduct by the voters. In this case the class of voters whose signatures were tossed for trivial and arbitrary "errors" in the date or signature or numbering may be small but is crucial to the rights of all other signors and

[13] The "purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the state's jurisdiction against intentional and arbitrary discrimination . . . occasioned . . . by its improper execution through duly constituted agents." *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445, 43 S.Ct. 190, 67 L.Ed. 340 (1923).

the candidates. "A class of one is likely to be the most vulnerable of all," and accordingly, such a class should not be denied the protection of the equal protection clause. *Esmail v. Macrane*, 53 F.3d 176, 180 (7th Cir. 1995).

These disenfranchised voters suffered "intentional" discrimination within the meaning of equal protection jurisprudence. *Lewis v. City of Fort Collins*, 903 F.2d 752, 755 n.1 (10th Cir. 1990) (footnote omitted), quoted with approval, *Welsh v. City of Tulsa*, 977 F.2d 1415, 1420 (10th Cir. 1992). Thus the equal protection clause may be violated whenever regulations are not rationally related to a legitimate government interest. See *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 67 L.Ed.2d 186 (1981).

Moreover, "a number of facially valid election laws may operate in tandem to produce impermissible barriers to constitutional rights." *Storer v. Brown*, 415 U.S. 724, 737, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974). That is what occurs in this case. Therefore, "a reviewing court must determine whether 'the totality of the [state's] restrictive laws taken as a whole imposes a[n unconstitutional] burden on voting and associational rights." *Williams v. Rhodes*, *supra*, 393 U.S. at 34.

VI. THE OREGON SUPREME COURT'S CONSTITUTIONAL ANALYSIS WAS INCORRECT.

The Oregon Supreme Court concluded that Applicants' rights under the U.S. Constitution were not violated, because, "like all political participants," they must "comply with the pertinent signature gathering procedures, that Oregon law requires." That analysis would allow a State to impose any requirement it may choose, regardless of its effect on the constitutional rights of voters, circulators, and candidates. There is no support for this proposition in federal case law.

As for the Oregon Supreme Court's analysis of *ACLF*, *supra*, the fact that this Court found some of Colorado's unchallenged statutory requirements as not in violation

the U.S. Constitution does not mean that all statutory requirements, no matter what they are, are immune from constitutional attack. In this case, Applicants submitted far more than enough verified voter signatures, without violating the written terms of any Oregon statute or rules. The Oregon Supreme Court then mentions fraud, but neither that Court, nor Defendant, identified the potential fraud that is in any way countered by application of the "unwritten rules" or of the sequential sheet numbering requirement.

The Oregon Supreme Court simply failed to address the severe burden placed upon Plaintiffs by the retroactive application of unwritten rules and by the application of the sequential sheet numbering requirement, despite Defendant's advice to the Nader Campaign to discontinue such numbering late in the signature drive. Nor did that Court address whether the Oregon scheme is narrowly tailored to achieve whatever state interest could have been identified. Thus, the Oregon Supreme Court misstated the applicable constitutional law and rendered a decision in conflict with governing precedent of the United States Supreme Court.

This case also raises important issues of federal constitutional law having significant practical consequence. If state law allows state officials to retroactively apply unwritten rules to disqualify entire sheets of valid and verified voter signatures, there is no practical way for independent candidates to run for federal office.

Dated: December 22, 2004

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No. _____

In The
Supreme Court of the United States

SANDRA KUCERA, SARAH THERESE WINDER, KRISTIN ZUBEL, NATALIE BOLTON, PHILLIP SALISBURY, SAMANTHA BERG, TIMOTHY JOHNSON and GREGORY KAFOURY,

Petitioners,

v.

BILL BRADBURY, Secretary of State, DEMOCRATIC PARTY OF OREGON, JOHN NEEL PENDER and JAMES EDMUNSON,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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337 Or. 384, 97 P.3d 1191

Supreme Court of Oregon,
En Banc.

Sandra KUCERA, an elector of Oregon and candidate for Vice President of the United States, Sarah Therese Winder, Kristen Zubel, and Natalie Bolton, each an elector of Oregon and signor of petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States and as a circulator of said nominating petition, Phillip Salisbury and Samantha Berg, each an elector of and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States, Timothy Johnson, a circulator of said nominating petition who is not an elector of Oregon, Gregory Kafoury, an individual, an elector of Oregon and Co-Chair, Nader for President 2004 in Oregon,
Plaintiffs-Adverse Parties,
v.
Bill BRADBURY, Secretary of State,
Defendant-Relator,
and
Democratic Party of Oregon, John Neel Pender and James Edmunson,
Intervenors Below.

(CC 04C18259; SC S51756)
Submitted Sept. 17, 2004.
Decided Sept. 22, 2004.

Original proceeding in mandamus.*

* On petition for a writ of mandamus from an order of the Marion County Circuit Court, Paul Lipscomb, Judge.

Kaye E. McDonald, Assistant Attorney General, Salem, filed the petition and supplemental memorandum for defendant-relator. With her on the petition and memoranda were *Hardy Myers*, Attorney General, and *Mary H. Williams*, Solicitor General.

Daniel W. Meek, Portland, filed the memorandum in opposition for plaintiffs-adverse parties.

Margaret Olney, Smith, Diamond & Olney, Portland, filed the memorandum for amici curiae Service Employees International Union and Oregon Education Association.

DURHAM, J.

Oregon's Secretary of State Bill Bradbury seeks a writ of mandamus from this court requiring Judge Lipscomb of the Marion County Circuit Court to vacate an order that he entered in the underlying proceeding, which we describe below in detail. The order required the Secretary of State to certify the nomination of Ralph Nader as an independent candidate on Oregon's November 2, 2004, general election ballot. For the reasons set out below, we direct that a peremptory writ of mandamus issue requiring the trial court to withdraw that order.

THE NADER CAMPAIGN'S PETITION FOR NOMINATION BY INDIVIDUAL ELECTORS

Oregon law provides for the nomination of candidates for partisan public office by a major political party, ORS 249.078, a minor political party, an assembly of electors, or individual electors, ORS 249.705. ORS 249.740 describes the procedure for nomination of candidates by individual electors:

"(1) A certificate of nomination made by individual electors shall contain a number of signatures of electors in the electoral district equal to not less than one percent of the total votes cast in the electoral district for which the nomination is intended to be made, for all candidates for presidential electors at the last general election.

"(2) Each elector signing a certificate of nomination made by individual electors shall include the residence mailing address of the elector. Except for a certificate of nomination of candidates for electors of President and Vice President of the United States, a certificate of nomination made by individual electors shall contain the name of only one candidate.

"(3) Before beginning to circulate the certificate of nomination, the chief sponsor of the certificate shall file a signed copy of the prospective certificate with the filing officer referred to in ORS 249.722. The chief sponsor of the certificate shall include with the prospective certificate a statement declaring whether one or more persons will be paid money or other valuable consideration for obtaining signatures of electors on the certificate. After the prospective certificate is filed, the chief sponsor shall notify the filing officer not later than the 10th day after the chief sponsor first has knowledge or should have had knowledge that:

"(a) Any person is being paid for obtaining signatures, when the statement included with the prospective certificate declared that no such person would be paid.

"(b) No person is being paid for obtaining signatures, when the statement included with the prospective certificate declared that one or more such persons would be paid.

"(4) The circulator shall certify on each signature sheet that the individuals signed the sheet in the presence of the circulator and that the circulator believes each individual is an elector registered in the electoral district.

"(5) The signatures contained in each certificate of nomination made by individual electors shall be certified for genuineness by the county clerk under ORS 249.008.

"(6) As used in this section, 'prospective certificate' means the information, except signatures and other identification of certificate signers, required to be contained in a completed certificate of nomination."

Under ORS 249.740(5), the county clerk must certify for genuineness the signatures of electors in the county that accompany the certificate of nomination by individual electors. ORS 249.008 requires the county clerk of each county, before the filing of the certificate of nomination by individual electors, to verify the elector signatures and to certify the number of signatures believed to be genuine. ORS 249.008 provides, in part:

"(1) Except as provided in subsection (2) of this section, before a nominating petition, minutes of an assembly of electors, or petition by individual electors is offered for filing, the county clerk of each county in which the signatures were secured shall compare the signatures of electors on the petition or minutes with the signatures of the electors on the elector registration cards. Any petition or minutes submitted for verification under this section shall contain only original signatures. The county clerk shall attach to the petition or minutes a certificate stating the number of signatures believed to be genuine. The certificate is

prima facie evidence of the facts stated in it. A signature not included in the number certified to be genuine shall not be counted by the officer with whom the petition is filed. No signature in violation of the provisions of this chapter shall be counted.

"(2) If the total number of signatures presented to a county clerk for verification is 15,000 or more, the county clerk may use a statistical sampling technique authorized by the Secretary of State to verify the signatures. The sample shall be drawn from at least 100 percent of the number of signatures required for nomination."

ORS 249.009(1) authorizes the Secretary of State to adopt administrative rules prescribing the form of certificates of nomination by individual electors and a system for numbering all signature sheets of certificates for nomination by individual electors.

"The Secretary of State by rule shall:

"(a) Design the form of nominating or recall petitions, certificates of nomination by individual electors, minutes of an assembly of electors or minor political party formation petitions; and

"(b) Prescribe a system for numbering all signature sheets of nominating or recall petitions, certificates of nomination by individual electors, minutes of an assembly of electors or minor political party formation petitions."

The Secretary of State has exercised the authority that ORS 249.009(1) grants by designating as an administrative rule the "2004 State Candidate's Manual: Individual Electors" (SCMIE). OAR 165-010-0005(5). We discuss below in greater detail the rules that the SCMIE contains.

Plaintiffs are supporters of a campaign (the "Nader campaign") that seeks to nominate Ralph Nader and Sandra Kucera as President and Vice President, respectively, of the United States on the November 2, 2004, Oregon general election ballot through the nomination by individual electors procedure described in ORS 249.740. According to the record, ORS 249.740(1) obligated the Nader campaign to file not less than 15,306 signatures of Oregon electors with its certificate of nomination by individual electors under ORS 249.740(1). However, the Secretary of State determined that numerous signature sheets that the Nader campaign filed with its certificate of nomination contained errors in the certification or dating of the sheets by circulators or in the numbering of the sheets by Nader campaign representatives. In addition, a number of county clerks, acting on instructions from the Secretary of State, declined to verify elector signatures on sheets that reflected errors that the Secretary of State identified. In some cases, they removed the noncomplying signature sheets from the group of signatures certified for genuineness under ORS 249.740(5). Plaintiffs do not agree that the asserted errors in the signature sheets exist or, if they do exist, that they affect the validity of the elector signatures or the certificate of nomination by individual electors.

Due to his conclusion that numerous signature sheets did not comply with applicable legal requirements, the Secretary of State declined to count the elector signatures on the noncomplying signature sheets in determining whether sufficient valid elector signatures supported the certificate of nomination. On September 2, 2004, the Secretary of State notified Nader that his campaign had submitted 15,088 qualified signatures, which was 218

signatures short of the required number. The Secretary of State advised Nader, "Consequently, there are not sufficient qualified signatures for you to gain ballot access for this office."

PLAINTIFFS' LEGAL ACTION

On September 3, 2004, plaintiffs filed in Marion County Circuit Court an appeal of the action of the Secretary of State under ORS 246.910[1] and a petition for review

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[1] ORS 246.910 provides:

"(1) A person adversely affected by *any act or failure to act by the Secretary of State,* a county clerk, a city elections officer or any other county, city or district official under any election law, or by *any order, rule, directive or instruction made by the Secretary of State,* a county clerk, a city elections officer or any other county, city or district official *under any election law,* may appeal therefrom to the circuit court for the county in which the act or failure to act occurred or in which the order, rule, directive or instruction was made.

"(2) Any party to the appeal proceedings in the circuit court under subsection (1) of this section may appeal from the decision of the circuit court to the Court of Appeals.

"(3) The circuit courts and Court of Appeals, in their discretion, may give such precedence on their dockets to appeals under this section as the circumstances may require.

"(4) The remedy provided in this section is cumulative and does not exclude any other remedy against any act or failure to act by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law or against any order, rule, directive or instruction made by the Secretary of State, a county clerk, a city elections officer or any other county, city or district official under any election law."

(Emphasis added.)

of administrative action under ORS 183.484.[2] Plaintiffs alleged eight claims for relief. We summarize those claims for relief, because they are relevant to our disposition here.

The first claim for relief alleged that the Secretary of State's "decision to reject the nominating petitions was not accompanied by any findings of fact or conclusions of law sufficient to enable Plaintiffs (or anyone) to determine the reasons for the rejection" and that "[s]uch deficiency renders the decision unlawful."

The second claim for relief alleged that the Secretary of State "has apparently rejected over 3,000 valid and verified voter signatures" due to "some errors" committed by persons who circulated signature sheets or by the Nader campaign. Plaintiffs alleged that the refusal of the Secretary of State to count those signatures "is beyond his authority, is arbitrary and capricious, and is otherwise unlawful."

The third claim for relief alleged that the Secretary of State had rejected signature sheets "containing in the range of 2,000 valid and verified voter signatures on the ground that the sheets, as submitted to the Secretary of State, were not sequentially numbered." Plaintiffs asserted that the

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[2] ORS 183.484(1) provides:

"Jurisdiction for judicial review of orders other than contested cases is conferred upon the Circuit Court for Marion County and upon the circuit court for the county in which the petitioner resides or has a principal business office. Proceedings for review under this section shall be instituted by filing a petition in the Circuit Court for Marion County or the circuit court for the county in which the petitioner resides or has a principal business office."

Nader campaign had complied with applicable requirements for numbering sheets and that the Secretary of State's action was unlawful.

The fourth claim for relief alleged that the Secretary of State had rejected signature sheets containing "in the range of 700 valid and verified voter signatures on the ground that the sheets display some defect in the signature of the circulator or the date on the signature of the circulator." Plaintiffs asserted that the Secretary of State had "not stated which signature sheets were rejected for these reasons" and "has not stated the reason for the rejection of any signature sheet * * * ." Plaintiffs alleged that the Secretary of State's rejection of signature sheets due to the appearance of or date pertaining to a circulator's signature was unlawful.

The fifth claim for relief alleged that the Secretary of State's implementation of a rule that disqualified voter signatures on a nominating petition on the basis of alleged or proven errors by petition circulators, in signing, dating, or placing numbers on the sheets, violated the First and Fifth Amendments to the United States Constitution.[3]

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[3] The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The Fifth Amendment to the United States Constitution provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice

(Continued on following page)

The sixth claim for relief alleged that the Secretary of State's implementation of a rule that disqualified voter signatures on a nominating petition on the basis of alleged or proven errors by petition circulators – in signing, dating, or placing numbers on the sheets with no opportunity for administrative cure of alleged defects – violated Article I, sections 8 and 20, and Article II, section 1, of the Oregon Constitution.[4]

The seventh claim for relief alleged that the Secretary of State's implementation of a rule that disqualified a circulator's signature if it varied from the signature on the circulator's Oregon voter registration card discriminated against Oregon voters who are not registered to vote and violated the First Amendment right of plaintiffs to travel across state lines into Oregon to engage in core political speech and to circulate petition sheets.

Plaintiffs' eighth claim for relief sought reasonable attorney fees and costs for the action. Plaintiffs also

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put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[4] Article I, section 8, of the Oregon Constitution provides:

"No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

Article I, section 20, of the Oregon Constitution provides:

"No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Article II, section 1, of the Oregon Constitution provides: "All elections shall be free and equal."

requested declaratory and injunctive relief nullifying the Secretary of State's action.

Along with their complaint, plaintiffs filed a motion for preliminary injunction requiring the Secretary of State "to certify the Nader/Kucera ticket for the 2004 general election ballot * * * ." Plaintiffs supported the motion with affidavits from several circulators of the certificate of nomination signature sheets.

THE TRIAL COURT PROCEEDING

The case came before the trial court on September 8, 2004, on plaintiffs' motion for preliminary injunction. The court granted the motion of the Democratic Party of Oregon and two of its officers to intervene in support of the Secretary of State. The court denied a request by Service Employees International Union (SEIU) to intervene as a party, but allowed SEIU to appear as *amicus curiae*. The parties stipulated that the court could combine the hearing on the motion for preliminary injunction, including live testimony, affidavits, and all arguments, with a trial on the merits.

On September 9, 2004, the court filed its opinion and order, which we discuss below in greater detail. In the opinion, the court reviewed the pertinent statutes and administrative rules governing nominations by individual electors and focused its analysis on plaintiffs' fourth claim for relief, described above.

The court concluded that the Secretary of State had no authority, under applicable statutes and rules, to instruct county clerks to screen signature sheets for various problems related to the signature of the circulator

and the date of the circulator's signature. Those problems included the action of some circulators in certifying the signature sheets with the signer's initials or to cross out or attempt to modify the date ~~of the circulator's cer~~tification. The court also concluded that the Secretary of State's instructions to county clerks to screen elector signature sheets for circulator signature and dating problems before verifying the elector signatures were inconsistent with ORS 247.005,[5] with the Secretary of State's written rules in the SCMIE, and "with the Secretary's policy position set out in *Nelson v. Keisling* [, 155 Or.App. 388, 964 P.2d 284 (1998), *rev. den.*, 328 Or. 246, 987 P.2d 507 (1999)]." We analyze those bases for the court's conclusion below.

Ultimately, the court concluded that the Secretary of State had exceeded his authority by (1) instructing county clerks not to verify elector signatures if the signature sheets displayed circulator certification problems; and (2) disapproving elector signature sheets that county clerks had certified if the signature sheets displayed similar circulator certification problems.

The court rejected plaintiffs' third claim for relief, which alleged that the Secretary of State had exceeded his authority in rejecting signature sheets that had not been numbered sequentially. The court did not address or resolve other claims for relief in its order and opinion.

On September 13, 2004, the court entered a general judgment that stated:

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[5] ORS 247.005 provides:

"It is the policy of this state that all election laws and procedures shall be established and construed to assist the elector in the exercise of the right of franchise."

"This case came before the Court upon plaintiffs' Motion for a Preliminary Injunction and heard on September 8, 2004. By stipulation of the parties, the request for preliminary relief was combined with trial on the merits, including live testimony, testimony by affidavits, oral argument and extensive legal briefing by the parties, including intervenor-defendant, Democratic Party of Oregon. The Court issued its Order and Opinion dated September 9, 2004 with regard to plaintiffs' third and fourth claims for relief as set forth in said opinion and order, and finding that its ruling on the fourth claim for relief is dispositive of the merits without reaching constitutional claims, now enters judgment as follows:

"Now, hereby, it is ORDERED and ADJUDGED:

"1. Defendant Secretary of State is hereby ordered to certify the results of the nominating petitions of Ralph Nader and Sandra Kucera for independent candidate to the appropriate elections authorities and to order the preparation of ballots for President and Vice-President for the 2004 General Election which contain the names of Ralph Nader and Sandra Kucera as independent candidates for President and Vice-President.

"2. Plaintiffs are entitled to recover their costs and disbursements incurred herein."

POST-JUDGMENT PROCEEDINGS

The Secretary of State filed his petition for writ of mandamus on September 15, 2004. With the petition, he also filed an emergency motion requesting expedited review of the petition and a decision from this court by September 22, 2004, if possible, so that elections officials

could proceed with the printing of accurate ballots for the November 2, 2004, general election.

On September 16, 2004, this court allowed the motion to expedite review and set an accelerated briefing schedule. In addition, this court allowed a motion by SEIU and the Oregon Education Association to appear as *amici curiae*. The parties filed their briefs and excerpts of record on September 17, 2004, and the court took the petition under advisement. The court expresses its appreciation to counsel for all parties and *amici curiae* for their cooperation and prompt submission of materials to the court in this case.[6]

MANDAMUS IS AN APPROPRIATE REMEDY

Plaintiffs assert that mandamus is not an appropriate remedy in the circumstances. We disagree. The Secretary of State has a strong interest in a prompt resolution through this mandamus proceeding of plaintiffs' challenge to his authority to reject the certificate of nomination by individual electors filed by the Nader campaign. The petition seeks the determination of questions of law regarding the authority of the Secretary of State, not to control discretionary determinations by the trial court, as plaintiffs argue. Without a prompt resolution of plaintiffs' challenge to the authority of the Secretary of State, the state's strong interest in the efficient administration of the November 2, 2004, general election will suffer irreparable

[6] In addition to this mandamus proceeding, the Secretary of State filed an appeal from the trial court's general judgment. On September 16, 2004, the Court of Appeals entered an order certifying the appeal to this court under ORS 19.405 and ORAP 10.10. On the same day, this court accepted the certification.

injury. Under the circumstances, the Secretary of State's right to appeal from the trial court's judgment provides a remedy at law that is chimerical at best.

Plaintiffs further argue that this mandamus proceeding improperly seeks to resolve unadjudicated questions of fact. They contend, for example, that the Secretary of State was estopped from requiring the submission of sequentially numbered signature sheets to each county by reason of advice that the "appropriate person" in the Secretary of State's office had given to the Nader campaign. Additionally, plaintiffs argue that they asserted in the trial court the factual claim that the circulator signatures on a large number of rejected signature sheets were indeed authentic signatures. Again, we disagree.

Plaintiffs challenged several actions of the Secretary of State, including the application of administrative rules, the promulgation and application of written instructions and directives, and the determination that the Nader campaign had filed insufficient elector signatures to support a certificate of nomination by individual electors. Properly viewed, the issues in this mandamus proceeding concern a single legal question: Did Oregon law authorize the Secretary of State to take the actions that he took at the time he acted? As that question makes clear, the facts that are most pertinent to that inquiry are those that responsible elections officials knew or should have known when they acted. We turn now to the legal question stated above.

AUTHORITY OF SECRETARY OF STATE TO DISQUALIFY ELECTOR SIGNATURES DUE TO VIOLATION OF CIRCULATOR SIGNATURE REQUIREMENTS

The premise for the trial court's decision was that no statute or rule expressly authorized the Secretary of State to prohibit the counting of otherwise valid signatures of electors that supported a certificate of nomination simply because of arguable violations of signature and dating requirements respecting circulators. The trial court also believed that disqualification of elector signatures was inconsistent with ORS 247.005 and with "the prior policy of the Elections Division," as recited in the Court of Appeals decision in *Nelson*. For the following reasons, we disagree with the trial court.

The legislature has acted in several ways to provide the procedures for nominating candidates by individual electors. First, the legislature has enacted ORS 249.740. Second, the legislature has adopted several statutes that delegate authority over that procedure, and other election procedures, to the Secretary of State. ORS 249.009(1), quoted above, is one example. In addition to authorizing rulemaking, the legislature has enacted ORS 246.110, which provides:

> "The Secretary of State is the chief elections officer of this state, and it is the secretary's responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election laws."

The legislature also has enacted ORS 246.150, which provides:

> "The Secretary of State may adopt rules the secretary considers necessary to facilitate and assist in achieving and maintaining a maximum degree of correctness, impartiality and efficiency in administration of the election laws."

In addition to the foregoing authority, and to ensure that the Secretary of State carries out the responsibility described in ORS 246.110, the legislature has required the Secretary of State to communicate with each county clerk through written directives and other means on election procedures that are under the direction and control of the county clerk. ORS 246.120 provides:

> "In carrying out the responsibility under ORS 246.110, the Secretary of State shall prepare and distribute to each county clerk detailed and comprehensive *written directives,* and shall *assist, advise and instruct* each county clerk, on registration of electors and election procedures which are under the direction and control of the county clerk. The directives and instructions shall include relevant sample forms of ballots, documents, records and other materials and supplies required by the election laws. A county clerk affected thereby shall comply with the directives or instructions."

(Emphasis added.)

As already noted, the Secretary of State exercised the rulemaking authority that ORS 249.009(1) delegates by adopting SCMIE as a rule. The record also demonstrates that the Secretary of State exercised his authority under ORS 246.120 by issuing written instructions to all county clerks regarding the verification of elector signature sheets from the Nader campaign, including directions for addressing potential problems with the signature and dating

of signature sheets by circulators.[7] The written instructions to the county clerks from John W. Lindback, Director of the Elections Division for the office of Secretary of State, stated:

> "Following are procedures we need all counties to follow when verifying the signature sheets for the Nader for President petition.
>
> "1. Counties will initially screen for potential problems with circulator signature and dating of signature sheets.
>
> "2. Counties will highlight with a highlighter the areas of concern on the signature sheet. **Do not** verify any signatures on the sheets that have any potential problems or issues. Once the Secretary of State's office makes a determination on these sheets, the county will be contacted and advised on whether to verify these signatures or to reject the sheet.
>
> "3. The areas to review for concern are:
>
> "The circulator signature line is blank or the circulator has signed using initials only. (First name initial with the full last name is sufficient).
>
> "There is no date on the circulator date signed line.

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[7] The record contains no evidence that any campaign other than the Nader campaign was employing the nomination procedure in ORS 249.740 at the time. That accounts for the reference to the Nader campaign in the written instructions now before us. We assume that the written instructions are applicable generally to all the elections procedures to which the Secretary of State has addressed them, not just to a single candidate or campaign, until the Secretary of State withdraws, modifies, or supercedes them. We note also that the candidate nominating process that is the subject of this case comprises a different set of statutes than those associated with ballot measures.

"Circulator date has been crossed out or modified.

"The circulator signed and dated **before** the dates of some or all of the the [sic] signers.

"Circulator name is a signature stamp.

"Circulator signature is photocopied or carbon copied.

"White out is used on the circulator name or date area.

"There are two **different** circulator names on the certification.

"The original signature of a circulator has been crossed out, and a new circulator's signature is inserted.

"4. Once the counties have screened for these items the county will fax any sheets of concern to the Secretary of State Elections Division * * * [Elections Division officials] will make the final determination on these sheets.

"5. Counties will retain and not return any signature sheets to the Nader Campaign that may have any potential problems until the Secretary of State has resolved these issues and notified the county.

"6. On signature sheets that have no issues and appear to be sufficient, the counties will verify the signatures and cross through any blank signature lines on the signature sheets with a marker so that no other signers may be added to that sheet **after** the county has verified the sheets.

"7. Counties will verify all signatures submitted only on signature sheets that do not have any issues. The county will retain a copy of all signature sheets submitted and return the original sheets with the counties certification to the Nader Campaign."

(Boldface in original.)

Lindback explained by affidavit the circulator signature review procedures that his office followed in inspecting the signature sheets that the county elections officials submitted. According to Lindback, state officials accepted a circulator's signature if the signature sheet bore a mark that appeared to be that person's signature. However, they engaged in further review if the purported signature was illegible or appeared to consist only of initials. That further review sought to confirm that the mark was the circulator's valid signature. To that end, state officials compared the mark on the signature sheet with the signature on the circulator's voter registration card, if applicable, or another signature exemplar. Lindback stated:

> "It bears emphasis that our practice is to accept a purported circulator's signature if there is any reasonable way to do so."

Lindback also described the procedures that his office followed to confirm compliance by circulators with the requirement that they state the date on which they certified each signature sheet. In general, state officials rejected signature sheets containing no date or alterations in the date, such as stricken material, but accepted signature sheets that the circulator had redated and re-signed or sheets that told a "clear story" about their completion and whose circulators apparently had completed the certification properly.

The trial court determined that the signature and date review procedures that Lindback had followed in his office were "unwritten rules," that they were "not supported by the written administrative rules as set forth in the Manual," that they were "inconsistent with ORS 247.005" and "the prior policy of the Elections Division" as

stated in *Nelson,* and that they "were not applied either uniformly or consistently in actual practice."

It is true that the review procedures that Lindback described were not themselves written, but that does not render them unlawful. On the contrary, the review procedures are nothing more than the step-by-step process by which the Secretary of State carried out legal authority found elsewhere in statute, in rule, and in the Secretary of State's written instructions to the county clerks. The review procedures were not, as the trial court's comments appear to suggest, yet another layer of unannounced legal barriers. They were, instead, the methodology by which the Secretary of State enforced existing legal standards. Specifically, Lindback designed the review procedures as a means to carry out the Secretary of State's duty under ORS 246.110 to "obtain and maintain uniformity in the application, operation and interpretation of the election laws." The necessity for the review procedures arose in this case because the Secretary of State gave written instructions to the county clerks to return to the Secretary of State for further review all signature sheets "that have any potential problems or issues," and gave them a list of those potential problems. The review procedures that Lindback described did not enlarge upon the written list; rather, they merely effectuated it with the goal of insuring that review by his office was a uniform process. The trial court's concern in this respect was not well taken.

The trial court's criticism that the Secretary of State's review procedures were "not supported by the written administrative rules as set forth in the [SCMIE]" appears also to reflect a concern that the SCMIE provides that a signature sheet format violation "will result in the rejection of those sheets," but does not similarly warn of

potential rejection of signature sheets for other errors, such as in the signature and dating of sheets by circulators. Relatedly, the trial court noted that the SCMIE warns that violation of the circulator certification requirements may result in conviction of a felony with a significant fine and imprisonment, but gives no notice that a violation of those requirements will lead to a disqualification of the elector signatures.

Those concerns of the trial judge also are not well taken. In practical terms, the trial court construed the SCMIE not to permit the sanction of disqualification of elector signatures due to circulator certification errors, because, although the SCMIE mentioned other potential sanctions, it did not mention that particular sanction under these particular circumstances. But, when we consider the circulator certification rules in context, their silence about the possible effect of a violation on the validity of elector signatures is just that – silence. The notice in the rule that certain criminal consequences "may result" from a violation is a pointed warning to circulators, not an assurance to electors who sign the signature sheet that their signatures will count despite the circulator's improper certification.

It is important to remember that ORS 249.740(4) requires each circulator to *certify* on each signature sheet that the signer had signed the sheet in the circulator's presence and that the circulator believed that the signer was an elector registered in the electoral district. The term "certify" means "to attest esp. authoritatively or formally * * * to present in formal communication, esp. in a document under hand or seal * * * ." *Webster's Third New Int'l Dictionary* 367 (unabridged ed. 1993). In keeping with the legislature's requirement of a formal attestation, SCMIE

requires the circulator to "sign" the signature sheet, and the Secretary of State's written instructions call for the use of a "signature." A "signature" is "the name of a person written with his own hand to signify that the writing which precedes accords with his wishes or intentions." *Id.* at 2116. Thus, for example, the Secretary of State logically could disqualify a mark that consisted of mere initials, because the mark fails to display the required signature. *See Don't Waste Oregon Com. v. Energy Facility Siting,* 320 Or. 132, 142, 881 P.2d 119 (1994) (sustaining "agency's plausible interpretation of its own rule").

In adopting the rules set out in the SCMIE, in issuing written instructions to the county clerks, and in utilizing the circulator signature and date review procedures, the Secretary of State was obtaining and maintaining uniformity in the operation of an election law, *i.e.,* the certification requirement in ORS 249.740(4), as ORS 246.110 required. The Secretary of State thus may conclude, and clearly has so concluded, that a circulator's failure to comply with the Secretary of State's requirements for circulator certification means that the purported certification is invalid and the signature sheet does not comply with ORS 249.740(4).

The trial court opined that there was no valid policy reason to enforce the circulator certification requirement by disqualifying the signature of an elector if the county clerk had been able to verify that the electors' signatures on the disqualified sheets were genuine. That overlooks the requirement in ORS 249.740(4) that the circulator must certify that the individual signed the sheet *in the presence of the circulator.* The bare presence of an elector's signature on a sheet is not enough to show compliance with that requirement. The certification requirement

serves to discourage fraud in the execution of signature sheets. The Secretary of State's choice to invalidate a signature sheet if the circulator violates the certification requirement promotes that objective. The trial court's concerns in this respect were not legally justified.

We next note that the trial court's reliance on ORS 247.005 was misplaced. That statute is the legislature's statement of state policy to assist electors in the exercise of the franchise. It does not purport to invalidate rules and procedures that the Secretary of State lawfully adopts pursuant to statutory command or delegated authority. Were the rule otherwise, virtually any election law or rule would be vulnerable to invalidation under ORS 247.005. We decline to accord that intention to the legislature.

The trial court's reliance on *Nelson,* 155 Or.App. 388, 964 P.2d 284, also was misplaced. In *Nelson,* the Court of Appeals determined that a civil penalty of a $250 fine was the exclusive remedy for violation of an election statute, ORS 260.560, and that the legislature did not authorize the invalidation of signatures as an additional remedy. The court stated:

> "Neither ORS 260.560 nor OAR 165-014-0005 spells out the consequence for violating the requirement that petition circulators be Oregon registered voters. ORS 260.995, however, provides that the Secretary or the Attorney General may impose a civil penalty not to exceed $250 " 'for each violation of any provision of Oregon Revised Statutes relating to the conduct of any election, any rule adopted by the Secretary of State under ORS chapters 246 to 260 or any other matter preliminary to or relating to an election, for which no penalty is otherwise provided.'

> "There is no question that the civil penalty provision applies to violations of ORS 260.560 and OAR 165-014-0005 (1996). The question is whether that remedy is the exclusive remedy for violations of the statute and the rule. Certainly, nothing in the language of the statute suggests any legislative intention to make the civil fine cumulative of other remedies such as the invalidation of signatures. The legislature expressly has provided for invalidation of signatures upon violation of other statutes. *See, e.g.,* ORS 249.008(1) ('No signature in violation of the provisions of this chapter shall be counted.'); ORS 249.865(5) ('[a]ny intentional or willful violation [of the statute] shall invalidate the prospective petition'); ORS 250.105(2) (the Secretary shall not accept initiative or referendum petition if fewer than required number of signatures are submitted). The failure of the legislature to include similar language in its description of the consequences of violating ORS 260.560 strongly suggests that it did not intend invalidation of signatures to be a remedy for violating that statute."

Id. at 393-94, 964 P.2d 284. The trial court read *Nelson* to suggest that the legislature's decision not to state expressly in ORS 249.740(4) or elsewhere that a violation of circulator certification requirements would lead to the invalidation of signatures, as the legislature had so stated in ORS 249.008(1), meant that the legislature did not intend to authorize that remedy.

Even if *Nelson* correctly construed the contrast in the statutory texts that it considered – an issue that we need not decide here – that case is distinguishable. As we have explained elsewhere, the Secretary of State has determined, in the lawful exercise of delegated authority, that a circulator's violation of certification requirements deprives the affected signature sheet of the certification that ORS

249.740(4) requires. The Secretary of State's determination advances the legislature's objective of deterring fraud in the nomination process. *Nelson* did not address the legal effect of the Secretary of State's delegated authority to reach that determination and to adopt rules and procedures to deter fraud in the election system.

Finally, the trial court noted that some counties did not comply with the Secretary of State's written instruction to scrutinize signature sheets for circulator certification problems. After those counties submitted their sheets of verified elector signatures, the Secretary of State's staff examined the signature sheets for the circulator certification problems that the counties had neglected to investigate. If the staff determined that the circulator certifications violated the Secretary of State's requirements, then staff did not count the elector signatures on the affected signature sheets. The trial court determined that "[t]here appears to be no statutory or administrative rule authority for that novel action by the Secretary at the post-verification stage" and that that action violated ORS 247.005.

The trial court acknowledged that Lindback had sought to justify that action by citing the Secretary of State's responsibility, expressed in ORS 246.110, "to obtain and maintain uniformity in the application, operation and interpretation of the election laws." We agree with Lindback's explanation. The noncompliance by several counties with the Secretary of State's written instructions, issued under the Secretary of State's express authority in ORS 246.120, threatened a violation of the uniform application of the Secretary of State's requirements for circulator certification. *See* ORS 246.120 ("A county clerk affected

thereby shall comply with the [Secretary of State's] directives and instructions.") Faced with that potential violation of uniformity, the Secretary of State's choice to engage in a post-verification review of signature sheets from noncomplying counties was a permissible one. And, for the reasons already stated, the policy statement in ORS 247.005 does not undermine the Secretary of State's authority under ORS 246.110 to make that choice.

In light of the foregoing, we conclude, that the trial court impermissibly sustained plaintiff's fourth claim for relief. Plaintiffs argue, however, that the court should not grant a writ of mandamus because each of their other claims for relief would warrant the same injunctive relief that the trial court granted. Plaintiffs assert that the record demonstrates, as a matter of law, that plaintiffs are entitled to the same relief under each of those claims. We have considered plaintiffs' alternative theories, because, if one or more were correct, it would obviate the necessity of relief in mandamus.

Plaintiffs correctly identify their burden at this point respecting their other claims for relief. ORS 18.082(3) provides:

> "Upon entry of a general judgment, any claim in the action that is not decided by the general judgment or by a previous limited judgment, that has not been incorporated into the general judgment under subsection (2) of this section, or that cannot be decided by a supplemental judgment, is dismissed with prejudice unless the judgment provides that the dismissal is without prejudice."

Under that statute, the trial court's general judgment dismissed with prejudice all claims for relief except the

fourth claim for relief that the court expressly sustained. Consequently, plaintiffs can prevail on their alternative arguments only if there is no evidence in the record to support the dismissal with prejudice of the remaining claims. We turn now to those claims.

PLAINTIFFS' ALTERNATIVE ARGUMENTS

Plaintiffs assert in their first claim for relief that the Secretary of State, in notifying Nader that his campaign had filed insufficient signatures, failed to include with the decision any findings of fact or conclusions of law to explain the reasons for that action. Plaintiffs seek review of that notification under ORS 183.484 as an order in other than a contested case.

Plaintiffs' first claim relies on a misinterpretation of an agency's responsibility in issuing an order in other than a contested case. In that context, "nothing in the APA directs an agency in other than a contested case proceeding to make a record or to make findings of fact before issuing its order." *Norden v. Water Resources Dept.*, 329 Or. 641, 647, 996 P.2d 958 (2000). Under *Norden,* an agency's failure to incorporate findings of fact or conclusions of law into an order in other than a contested case to explain the basis for the order is not a violation of any law. Consequently, plaintiffs' first claim for relief fails.

Plaintiffs' second claim for relief asserts that the Secretary of State has no authority to refuse to recognize verified elector signatures on signature sheets that contain errors committed by circulators or the Nader campaign. However, the claim rests on the same false premise that this court rejected above in discussing plaintiffs'

fourth claim for relief. For the same reasons, plaintiffs' second claim for relief is not well taken.

Plaintiffs' third claim for relief challenges the Secretary of State's rejection of signature sheets that the Nader campaign submitted without sequential numbering. Plaintiffs contend, and the Secretary of State disputes, that the Nader campaign followed the instruction of elections officials in numbering submitted signature sheets. Plaintiffs argue that the Secretary of State is estopped to deny the advice that the Nader campaign received.

ORS 249.009(1)(b) authorizes the Secretary of State to adopt rules that "[p]rescribe a system for numbering all signature sheets of * * * certificates of nomination by individual electors * * * ." The Secretary of State has exercised that authority by adopting the following rule in the SCMIE:

> "Before submitting the signature sheets to the appropriate county elections official for signature verification, the chief sponsor must * * * [w]ithin each individual county, sequentially number each signature sheet in the space provided; * * * "

Lindback explained that his office rejected the signature sheets in question because the Nader campaign had failed to number the sheets before submission to county election officials in violation of the rule.

As a general proposition, a governmental agency may be estopped from asserting a claim inconsistent with a previous position that it has taken. *Dept. of Transportation v. Hewett Professional Group,* 321 Or. 118, 126, 895 P.2d 755 (1995). However, one element required for estoppel is

reasonable reliance on a governmental actor's misstatements. Reliance on a misstatement is not reasonable if the governmental actor had no authority to make the misstatement. *Id.* The alleged misstatement on which plaintiffs rely would have had the effect of negating the administrative rule that the Secretary of State enforced. Nothing in the record demonstrates that any person who may have advised the Nader campaign had (or indeed could have) any authority to negate a rule. Thus, any reliance on that statement, if made, was not reasonable. The third claim for relief is legally flawed for that reason.

Plaintiffs' fifth, sixth, and seventh claims for relief assert various constitutional challenges, which we summarized above, to the Secretary of State's disqualification of signature sheets due to errors by circulators in signing and dating the sheets. Plaintiffs contend that a compelling justification must support the state's enforcement of any rule that results in the disqualification of the signatures of registered voters.

We do not dispute that the statutory procedure for nomination by individual electors implicates important aspects of the political liberty and associational freedom of Oregon's electors. However, plaintiffs' claim that the Secretary of State's action effectively compels them to collect thousands of signatures in addition to the number required by Oregon statute or the state constitution is illusory. Plaintiffs, like all political participants, must collect only the number of signatures, and comply with the pertinent signature gathering procedures, that Oregon law requires. Thus, contrary to plaintiffs' argument, the Secretary of State has not imposed an undue burden on

plaintiffs' political freedoms under the state or federal constitutions.[8]

The United States Supreme Court has noted, in an analogous context, that a state (there, Colorado) "retains an arsenal of safeguards" to protect the integrity of a ballot-initiative process, to deter fraud, and to diminish corruption. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 204-05, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999). The Court in *Buckley* specifically cited a state statute that invalidated an initiative "if [the] circulator has violated any provision of the laws governing circulation" as one example of a legitimate state safeguard. *Id.* at 205. The Court also noted that states "have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally," *id.* at 191, citing as an example Colorado's requirement that petition circulators attach to each petition section an affidavit containing particular factual statements.

We recognize, of course, that functional differences exist between the initiative process scrutinized in *Buckley* and the candidate nomination procedure under consideration here. But, as noted, the underlying signature collection and circulator certification procedures are analogous. For that reason, we conclude that, according to the principles discussed in *Buckley,* Oregon's circulator certification procedure, and the other procedures discussed above that protect the electoral process from fraud, withstand federal constitutional scrutiny. It follows from the foregoing that

[8] Plaintiffs present no separate argument under the state constitution in this court.

the Secretary of State's disqualification of signature sheets in this case is not unconstitutional for the reasons asserted by plaintiffs.

Plaintiffs' only remaining claim concerns attorney fees and costs. That claim affords no alternative basis for sustaining the action of the trial court.

CONCLUSION

We conclude, for the reasons stated above, that the Secretary of State is entitled to relief from the order of the trial court that required the Secretary of State "to forthwith certify the Nader nomination as an independent candidate for the 2004 general election ballot." A peremptory writ will issue forthwith requiring the trial court to withdraw that order and enter judgment in favor of the Secretary of State. We will combine the writ with this court's appellate judgment. On the court's own motion, the court waives the application of ORAP 9.25, providing for petitions for reconsideration.

Combined peremptory writ and appellate judgment to issue forthwith. ORAP 9.25, providing for petitions for reconsideration, is waived on the court's own motion. ORAP 1.20(5).

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

SANDRA KUCERA, an elector of Oregon and candidate for Vice President of the United States, SARAH THERESA WINDER, KRISTEN ZUBEL, and NATALIE BOLTON, each an elector of Oregon and signor of petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States and as a circulator of said nominating petition, PHILLIP SALISBURY and SAMANTHA BERG, each an elector of and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States, TIMOTHY JOHNSON, a circulator of said nominating petition who is not an elector of Oregon, GREGORY KAFOURY, an individual, an elector of Oregon and Co-Chair, Nader for President 2004 in Oregon,

Plaintiffs,

v.

BILL BRADBURY, Secretary of State,

Defendant.

Case No. 04C18259

OPINION AND ORDER

Oregon law rests considerable discretion with the Secretary of State for the administration of our election laws. ORS 246.110 provides that the Secretary is the chief elections officer of this state and that it is the Secretary's responsibility to maintain uniformity in the application, operation, and interpretation of the election laws. ORS 246.120 instructs the Secretary to prepare and distribute "detailed and comprehensive written directives" to each county clerk and to assist and instruct each county clerk on election procedures. Under ORS 246.150, the Secretary of State is also authorized to adopt written rules to facilitate and assist in maintaining a maximum degree of correctness, impartiality, and efficiency in the administration of the election laws.

However, the Secretary's discretion is not unlimited, and the rules, regulations, and written directives promulgated by the Secretary of State must be consistent with the statutes adopted by the legislative body for the conduct of elections in Oregon. And, notably, in ORS 247.005, the Oregon State Legislature has declared that "it is the policy of this state that all election laws and procedures shall be established and construed to assist the elector in the exercise of the right of franchise."

The specific issues raised in this case relate to the statutory provisions of ORS 249.740 for the Nomination of Candidates by Individual Electors, and to the rules adopted by the Secretary of State to implement that statutory procedure. As pertinent here, ORS 249.740(4) provides that the circulator of each signature sheet shall certify that the individual electors whose signatures are affixed thereon had signed the sheet in the presence of the circulator, and that the circulator believes each individual is an elector registered in the electoral district. ORS

249.740(5) then further provides that the signatures contained in each certificate of nomination made by individual electors shall be certified for genuineness by the county clerk pursuant to ORS 249.008. And ORS 249.008(1) sets forth the statutory procedures for the county clerk to follow in verifying the genuineness of the signatures of the individual electors on the signature sheets. After comparing each elector's signature on the petition with the elector's signature on the voter registration cards, the county clerk is directed to attach to the petition a certificate stating the number of signatures believed to be genuine.

In addition to these statutes, and as required by ORS 249.009, the Secretary has promulgated certain written rules specifying the format of signature sheets that must be used for nominating petitions, as well as the numbering system to be utilized. Other administrative rules have been adopted to facilitate the circulator certification and elector signature verification processes set forth in ORS 249.740(4) and (5).

Those administrative rules were adopted in accordance with ORS 246.150 and are printed in written form as the 2004 State Candidate Manual: Individual Electors as set forth in OAR 165-010-0005(5). (A copy of the Manual is attached as Exhibit 1 to the original Affidavit of John Lindback in this case.)

The Introduction to the Manual declares that the Manual is intended to provide individuals interested in filing for candidacy for partisan office by petition notice of "the procedures and regulations necessary to file for office. This Manual provides a comprehensive overview of the

candidate filing process." That process is then set forth by the administrative rule process in the body of the Manual.

On page 4, under the heading Chief Sponsor of Certificate, Step 1 specifies that the chief sponsor reviews with the petition circulators the requirements for circulating the petition. As pertinent here, the rules provide:

> "All signatures must be personally witnessed by the petition circulator and the circulator's certification must be completed and dated after all signatures have been collected; and
>
> • No additional signatures may be added to that signature sheet once the circulator has signed the certification and dated the sheet."

Step 2 specifies that before submitting the signature sheets to the appropriate county elections official for signature verification, the chief sponsor must:

- "Sort the signature sheets by county;
- Within each individual county, sequentially number each signature sheet in the space provided; and
- Submit signature sheets to the appropriate county elections offices for verification, in sufficient time for the verification process to be finished before submitting the completed nominating petition to the Elections Division."

Next, on page 5, the Manual specifies that "as soon as possible the county elections official certifies the signatures and returns the signature sheets to the chief sponsor of the certificate of nomination with the total number of valid signatures." Thereafter, "the chief sponsor files the completed nominating petition with the Elections Division" of the Secretary of State. The petition consists of

both a Certificate of Nomination by Individual Electors and "Verified signature sheets with the sufficient number of signatures."

The above general description details the process prescribed by the rule for the preparation, circulation, and verification and filing of the nomination petitions as set forth by the administrative rules of the Secretary of State. There are only a few more specific additional regulations detailing Signature Sheet Requirements, Petition Signer Requirements, Circulator Requirements, and Signature and Distribution Requirements. These are set forth on pages 12 and 13 of the Manual, and all relate back to the statutory requirements set forth in ORS 249.740 as discussed above.

Those more detailed and specific rules do provide that failure to obtain written approval before circulating the forms for the signature sheets "will result in the rejection of those sheets." Notably, however, no other similar rule authorizes the wholesale rejection of signature sheets for errors other than signature sheet format violations.

Specifically, the only additional requirements for petition circulators are two: "The circulator of the candidate nominating petition must sign the circulator's certification. . . ." And "The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification." The rule warns that violation of these circulator requirements may result in conviction of a felony with a fine up to $100,000 and/or prison for up to five years. But, no penalty of disqualification of the signatures of electors collected is provided for in the administrative rule.

This rule and the prescribed penalty, as set forth in the Manual, is consistent with the legislative policy set forth in ORS 247.005 as noted above; "all election laws and procedures shall be established and construed to assist the elector in the exercise of the right of franchise." It is also consistent with the policy position adopted by the Secretary of State in *Nelson v. Keisling*, 155 Or App 388, 964 P2d 284 (1988) rev. den. 328 Or 246, 987 P2d 507 (1999). *Nelson* arose in a somewhat different context, but the principle is the same. Despite violations of the then-applicable circulator rules, the Secretary then took the position that the verified signatures of the electors collected by those circulators should not be invalidated.

In this case, however, the Elections Division of the Secretary has taken a very different position. Mr. Lindback testified that each circulator must sign the circulation certificate with a full signature and that each full signature on each page submitted by the circulator must be verifiable by comparison with the circulator's own voter's registration if one exists, or with some other exemplar if a voter's registration form does not exist, and that initialed signatures cannot be verified as signatures unless the voter's registration also shows only an initialed signature. No written rule, however, justifies these additional requirements, although Mr. Lindback asserts that this reflects his office's longstanding historical practice.

Mr. Lindback's testimony at the hearing was not entirely consistent with his Second Affidavit submitted in this case. That Affidavit declares that alternative exemplars are only permitted to verify the signatures of non-registered circulators. "This is a narrow exception to the longstanding rule that extraneous proof – beyond the circulator's voter registration and on other petitions in the

Secretary's possession – of a circulator's signature generally is not permitted." At the hearing, Mr. Lindback testified that his office actually attempts to verify circulators' signatures with alternative exemplars if time permits.

Mr. Lindback, both by Affidavit and by live testimony, also described another unwritten rule practiced by his office:

> "It is also a longstanding rule that initials may not be used in lieu of a signature. Of course, some people's actual signatures appear similar to initials. If the circulator's signature, as shown on the voter registration card or on another permissible exemplar, confirms that the circulator's signature simply appears like initials, then the signature is accepted. But if the exemplar shows a different signature, then the initialed petition sheet is disqualified." (Second Affidavit of Mr. Lindback.)

These unwritten rules, however longstanding, are not supported by the written administrative rules as set forth in the Manual, and they are inconsistent with ORS 247.005, as well as with the prior policy of the Elections Division as set forth above. Additionally, it was obvious from the testimony of Mr. Lindback that the Secretary's unwritten rules were not applied either uniformly or consistently in actual practice.

Mr. Lindback also testified that pursuant to his written instructions to the county clerks, as set forth in Exhibits 2 and 3 to the Affidavit of John Lindback, Director of the Elections Division, the county clerks were to screen petition

sheets for circulator signature and dating problems before verifying the electors signatures appearing thereon, and were further instructed to verify only those elector signatures submitted "on signature sheets that do not have any issues." Presumably, these written instructions, prepared in August of 2004 for the Nader signature campaign, were distributed under the authorization set forth in ORS 246.120. However, these instructions are inconsistent with both the state elections policy established by the Legislature in ORS 247.005, and with the Secretary's own written rules as set forth in the Manual, as well as with the Secretary's policy position set forth in *Nelson v. Keisling*.

Interestingly, while some counties, most notably Multnomah, complied with these new written instructions, other counties apparently did not. Then, after the non-complying counties submitted their verified elector signature certificates on the signature petitions, Mr. Lindback and his staff went through those petitions again in Salem and disqualified and removed additional signature sheets that had verified elector signatures certified by the county clerk. This was done solely because of perceived signature and dating problems with the circulators' certifications. There appears to be no statutory or administrative rule authority for that novel action by the Secretary at the post-verification stage.[1]

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[1] The only potential statutory authority for this additional disqualification procedure would seem to be ORS 249.004 which permits filing officers to verify the validity of the contents of documents filed with the officer under Chapter 249. However, "the validity of the contents of the documents" at issue here would be the verified signatures of the electors and the county clerks' certification of the total number of verified signatures. Once the electors' signatures have

(Continued on following page)

The Nader campaign eventually was informed by the Secretary of State's Election Division that they fell 218 elector signatures short of qualifying their candidate for nomination by petition.

It is not disputed by the Secretary that if the elector signature sheets that had been verified by county clerks and certified to the Secretary had not been disallowed by the Secretary, the Nader campaign would have had more than enough "Verified signature sheets with the sufficient number of signatures," as required by the administrative rules as set forth in the Manual. And many more additional signature petitions were never even processed for verification at the counties because of the Secretary's instructions in August, 2004 to scrutinize for circulator certification "issues" before verifying elector signatures on the Nader nominating petitions. Neither action was authorized by administrative rule or statute, and each was inconsistent with both the state elections policy as established by the Legislature, ORS 247.005, and with the prior policy of the Secretary of State as expressed [sic] *Nelson v. Keisling*, supra.

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been verified as valid by the county clerk, there would be no policy reason to seek to disqualify them for alleged defects in the circulator certifications that would not run afoul of ORS 247.005: "It is the policy of this state that all election laws and procedures shall be established and construed to assist the elector in the exercise of the right of the franchise." In any event, ORS 249.004 was not cited as authority for the Secretary's disqualification of the previously verified electors' signatures which had already been certified to him by the county clerks. The only purpose cited by Mr. Lindback was "to maintain uniformity and consistency in the interpretation of the elections law" in accordance with ORS 246.110. Affidavit of John Lindback at page 5.

It follows without more[2] that Plaintiffs are entitled in this Court to the relief sought in their Petition. It is unnecessary to reach Plaintiffs' additional constitutional claims as the statutory claims are dispositive in their favor. Therefore, this Court orders the Secretary to forthwith certify the Nader nomination as an independent candidate for the 2004 general election ballot.

Dated this 9th day of September, 2004.

Hon. Paul J. Lipscomb
Presiding Judge

[2] Plaintiffs also complained of the manner in which the Secretary administered the rules related to the sequential numbering requirement. That requirement, however, is specifically authorized by both statute, ORS 249.009, and by an appropriate written administrative rule, as set forth in the Manual at page 4.

IN THE SUPREME COURT OF THE STATE OF OREGON

SANDRA KUCERA, an elector of Oregon and candidate for Vice President of the United States, SARAH THERESA WINDER, KRISTEN ZUBEL, and NATALIE BOLTON, each an elector of Oregon and signor of petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States and as a circulator of said nominating petition, PHILLIP SALISBURY and SAMANTHA BERG, each an elector of and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice President of the United States, TIMOTHY JOHNSON, a circulator of said nominating petition who is not an elector of Oregon, GREGORY KAFOURY, an individual, an elector of Oregon and Co-Chair, Nader for President 2004 in Oregon, Plaintiffs-Adverse Parties, v.	Marion County Circuit Court No. 04C18259 SC S51756 ORDER DENYING MOTION TO STAY, AND TO RECONSIDER

BILL BRADBURY,
Secretary of State,

Defendant-Relator,

and

DEMOCRATIC PARTY
OF OREGON,
JOHN NEEL PENDER and
JAMES EDMUNSON,

Intervenors Below.

Adverse Parties' motion to stay and to reconsider is denied.

Dated this 23rd day of September 2004.

/s/ _____
WALLACE P. CARSON, JR.
CHIEF JUSTICE

c: Daniel W. Meek
Mark McDougal
Gregory Kafoury
Kaye E. McDonald
Mary Hazel Williams
Roy Pulvers
Margaret S. Olney
Hon. Paul J. Lipscomb
Hon. Bill Bradbury

125 S. Ct. 27, 159 L.Ed.2d 855, 73 USLW 3204

Supreme Court of the United States

Sandra KUCERA, et al., applicants,

v.

Bill BRADBURY, Secretary of State of Oregon, et al.

No. 04A242.

Sept. 28, 2004.

Application to stay the order of the Oregon Supreme Court pending the filing and disposition of a petition for writ of certiorari presented to Justice O'CONNOR and by her referred to the Court denied.

Justice BREYER would grant the application for stay.

ORS 249.008. Verification of signatures by county clerk; removal of signatures prohibited after submittal.

(1) Except as provided in subsection (2) of this section, before a nominating petition, minutes of an assembly of electors, or petition by individual electors is offered for filing, the county clerk of each county in which the signatures were secured shall compare the signatures of electors on the petition or minutes with the signatures of the electors on the elector registration cards. Any petition or minutes submitted for verification under this section shall contain only original signatures. The county clerk shall attach to the petition or minutes a certificate stating the number of signatures believed to be genuine. The certificate is prima facie evidence of the facts stated in it. A signature not included in the number certified to be genuine shall not be counted by the officer with whom the petition is filed. No signature in violation of the provisions of this chapter shall be counted.

(2) If the total number of signatures presented to a county clerk for verification is 15,000 or more, the county clerk may use a statistical sampling technique authorized by the Secretary of State to verify the signatures. The sample shall be drawn from at least 100 percent of the number of signatures required for nomination.

(3) After signatures of electors on a nominating petition, minutes of an assembly of electors or petition by individual electors are submitted for verification, no elector who signed the petition or minutes may remove the signature of the elector from the petition or minutes.

ORS 249.009. Exclusive form of signature sheets for petitions; numbering of signature sheets.

(1) The Secretary of State by rule shall:

(a) Design the form of nominating or recall petitions, certificates of nomination by individual electors, minutes of an assembly of electors or minor political party formation petitions; and

(b) Prescribe a system for numbering all signature sheets of nominating or recall petitions, certificates of nomination by individual electors, minutes of an assembly of electors or minor political party formation petitions.

(2) Regardless of any provision to the contrary in a county or city charter or ordinance, for the purpose of nominating city or county candidates, recalling city or county officers or forming a minor political party, an individual must use the applicable form designed under this section.

ORS 249.740. Certificates of nomination made by individual electors; statement regarding payment of petition circulators; certification of signature sheets.

(1) A certificate of nomination made by individual electors shall contain a number of signatures of electors in the electoral district equal to not less than one percent of the total votes cast in the electoral district for which the nomination is intended to be made, for all candidates for presidential electors at the last general election.

(2) Each elector signing a certificate of nomination made by individual electors shall include the residence mailing address of the elector. Except for a

certificate of nomination of candidates for electors of President and Vice President of the United States, a certificate of nomination made by individual electors shall contain the name of only one candidate.

(3) Before beginning to circulate the certificate of nomination, the chief sponsor of the certificate shall file a signed copy of the prospective certificate with the filing officer referred to in ORS 249.722. The chief sponsor of the certificate shall include with the prospective certificate a statement declaring whether one or more persons will be paid money or other valuable consideration for obtaining signatures of electors on the certificate. After the prospective certificate is filed, the chief sponsor shall notify the filing officer not later than the 10th day after the chief sponsor first has knowledge or should have had knowledge that:

(a) Any person is being paid for obtaining signatures, when the statement included with the prospective certificate declared that no such person would be paid.

(b) No person is being paid for obtaining signatures, when the statement included with the prospective certificate declared that one or more such persons would be paid.

(4) The circulator shall certify on each signature sheet that the individuals signed the sheet in the presence of the circulator and that the circulator believes each individual is an elector registered in the electoral district.

(5) The signatures contained in each certificate of nomination made by individual electors shall be certified for genuineness by the county clerk under ORS 249.008.

(6) As used in this section, "prospective certificate" means the information, except signatures and other identification of certificate signers, required to be contained in a completed certificate of nomination.

ORS 254.500. Tally of write-in votes.

(1) This section governs the tally of votes cast for persons whose names were not printed on the ballot but are written in by electors. All such write-in votes for each office on the ballot shall be tallied together, except as follows:

(a) If the total number of write-in votes for candidates for the same nomination or office equals or exceeds the number of votes cast for any candidate for the same nomination or office on the ballot who appears to have been nominated or elected, the county clerk shall tally all write-in votes cast for the office to show the total number of votes cast for each write-in candidate.

(b) If no names of candidates are printed on the ballot for an office, the county clerk shall tally the votes cast for each candidate for the office who received a vote.

(2) No person other than the county clerk, a member of a counting board or any other elections official designated by the county clerk may tally write-in votes.

(2)

Supreme Court, U.S.
FILED
APR 19 2005
OFFICE OF THE CLERK

No. 04-872

In the Supreme Court of the United States

SANDRA KUCERA, SARAH THERESE WINDER, KRISTIN ZUBEL, NATALIE BOLTON, PHILLIP SALISBURY, SAMANTHA BERG, TIMOTHY JOHNSON and GREGORY KAFOURY,

Petitioners,

v.

BILL BRADBURY, Secretary of State, DEMOCRATIC PARTY OF OREGON, JOHN NEEL PENDER and JAMES EDMUNSON,

Respondents.

On Petition for Writ of Certiorari to the Oregon Supreme Court

RESPONDENT BILL BRADBURY'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1.

In the state courts, petitioners made an "as applied" challenge to the Oregon Secretary of State's determination that the Nader campaign had failed to obtain a sufficient number of signatures to qualify for the 2004 general election. Underlying most of those claims were petitioners' erroneous and/or disputed factual assertions that the Secretary had applied "unwritten rules" to their signature gatherers without notice or an opportunity to cure circulator certification errors. The Nader/Kucera ticket was not placed on the 2004 Oregon general ballot. After the election, the Secretary adopted new rules setting forth the review procedures that will be used in future elections, including rules regarding what constitutes sufficient and insufficient circulator certification, signature sheet dating requirements, and procedures for obtaining exemplars of certain circulators' signatures after notice from the Secretary of apparently non-complying signatures.

Are petitioners' claims based on the Secretary's application of "unwritten rules" and absence of notice during the Nader campaign moot?

If not, should this Court review the constitutionality of the new rules without allowing state courts an opportunity to consider the constitutionality of the new rules under state law?

2.

In rejecting petitioners' various claims, the Oregon Supreme Court held as a matter of state law that the Secretary had not applied "unwritten rules" to the Nader campaign. Rather, the Secretary had adopted rules, along with plausible interpretations of those rules, to give effect to elections laws, including Or. Rev. Stat. § 249.740(4), which requires that circulators certify on each signature sheet that the signer had

signed the sheet in the circulator's presence, and Or. Rev. Stat. § 249.009(1)(b), which requires the Secretary to promulgate a rule prescribing a system of petition signature sheet numbering. The Oregon Supreme Court further concluded that the legislature had authorized the Secretary to employ internal review measures to ensure uniformity in the application, operation and interpretation of the election laws. According to the state court, the Secretary carried out that legal authority in his written instructions to the county clerks.

Should this court review the state court's factual and legal determination that the Secretary did not apply "unwritten rules" to the Nader campaign under state law?

3.

At trial in state court, the Secretary and intervenors presented evidence and argument showing that sequential numbering of signature sheets, a rule specifically authorized by statute, is necessary in order to prevent fraud in nominating petitions. The Secretary and intervenors similarly presented evidence and argument showing that signing and dating requirements for nominating petition circulators, which were properly applied under the Secretary's lawful exercise of delegated authority, advanced the legislature's objectives of deterring fraud and promoting orderliness and efficiency in the nomination process. The Oregon Supreme Court relied on *Buckley v. American Constitutional Law Found.*, 525 U.S. 182, 190 (1999), as authority for the proposition that a state has "considerable leeway to protect the integrity and reliability of the initiative process" and that in analogous circumstances, a requirement that petition circulators attach an affidavit containing particular factual statements to a petition is one such legitimate safeguard. This Court elsewhere has made it clear that the conduct of the elections process is a constitutional obligation of the states properly requiring a significant degree of detailed regulation and that it will uphold reason-

able and nondiscriminatory procedural election regulations such as those challenged here.

Should this Court grant review to determine whether the Oregon Supreme Court's decision upholding the Secretary's implementation of requirements concerning the proper pagination, certification, and dating of signature sheets conflicts with unspecified decisions of this Court?

4.

In the trial court, petitioners made no claim that the Secretary denied voters equal protection by disqualifying signature sheets based on circulator error, and neither the trial court nor the Oregon Supreme Court considered that contention.

Should this Court review that unpreserved claim?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

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STATEMENT

Petitioners are supporters of a campaign that unsuccessfully sought to place Ralph Nader and Sandra Kucera as President and Vice President of the United States on the November 2, 2004, Oregon general election ballot through the procedure described in Or. Rev. Stat. § 249.740 for nomination by individual electors. Under that procedure, individual electors may nominate a candidate for each partisan public office to be filled at the general election by preparing and filing a certificate of nomination, as provided in Or. Rev. Stat. §§ 249.712 to 249.850; Supp. App. 40–50. The chief sponsor of the certificate must file a signed copy of the prospective certificate with the Elections Division for approval. Or. Rev. Stat. § 249.740; Supp. App. 45–47. After receiving approval of the proposed certificate, the chief sponsor may begin gathering signatures on the approved signature sheets.

Statute requires that each elector that signs a certificate of nomination made by individual electors must include the elector's residential mailing address. Or. Rev. Stat. § 249.740(2); Supp. App. 46. The circulator must certify on each signature sheet that the individuals signed the sheet in his or her presence and that the circulator believes that each person is an elector registered in the electoral district. Or. Rev. Stat. § 249.740(4); Supp. App. 46. To qualify for the ballot based on a certificate of nomination by individual electors, a certificate must contain a number of signatures of electors in the electoral district equal to not less than one percent of the total votes cast in the district for which the nomination is intended to be made, for all candidates for presidential electors at the last general election. Or. Rev. Stat. § 249.740(1). Collected signature sheets for each county must be submitted to the county clerk for verification of the genuineness of the signatures before the nominating petition is filed with the Secretary. Or. Rev. Stat. § 249.008(1); Supp. App. 39–40.

Among other things, county officials review the sheets to verify that each one bears the circulator's signature. In that process, county officials follow procedures established by the Secretary of State. In an affidavit, the Elections Director explained the procedures that were followed in the November 2, 2004, general election. According to him, if a sheet did not bear a circulator's signature, it was disqualified, but if it bore what appeared to be a signature, it was generally accepted without more. If a sheet bore a mark that was illegible or appeared to be initials, county officials identified that sheet for further review by his office. At that time, the elections staff would try to confirm that, despite appearances, the mark was the purported circulator's valid signature. By using the printed name under the circulator's signature, they attempted to locate the circulator's Oregon voter registration card. If the signature on the sheet appeared to match the signature on the card, the signature was accepted; if not, it was disqualified. Those aspects of the Secretary's process were historical and applied to every type of elections petition. Supp. App. 26–27.

The Secretary further explained that it was also a long-standing rule that initials could not be used in lieu of a signature. If the circulator's signature, as shown on the voter registration card or on another permissible exemplar, confirmed that the circulator's signature simply appeared like initials, then the signature was accepted. But if the exemplar showed a different signature, the initialed petition sheet was disqualified. Supp. App. 26–27.

In December, 2002, the Secretary promulgated amendments to the 2002 Candidates Manual (SCMIE), adding an additional requirement that circulators date the certification on each sheet. Supp. App. 11, 28. The date is considered a part of the circulator's certification, and failure to properly complete it constitutes failure to certify the petition sheet, resulting in disqualification. Supp. App. 11, 28. In examining

signature sheets for compliance with the date requirement, the point of the inquiry is whether it is clear from the face of the sheet that it was completed properly. Supp. App. 28. Accordingly, in past elections, the Secretary has applied these rules, as outlined by the Elections Director:

> 11. Similarly, in furtherance of the purpose to prevent fraud, the Secretary has interpreted the requirement of a dated signature to disqualify sheets bearing alterations (such as stricken materials), but has permitted corrections of a dating error by re-dating and re-signing.
>
> * * * * *
>
> 13. Where there is no date, obviously the sheet is not completed properly. It is disqualified.
>
> 14. Where the sheet is dated before the elector signatures, the sheet itself tells the clear story of how it was completed, but that clear story discloses that the sheet was completed improperly. The circulator cannot properly certify that the elector signatures on the sheet were affixed in the circulator's presence, and that the circulator believes each signor to be an eligible voter, until after the elector signatures have been affixed.
>
> 15. Similarly, a "post-dated" certification (a certification bearing a date after submission of the petition sheets to the Secretary of State), on its face, tells a clear story of how it was completed, but it is not completed properly. Where the certification is post-dated, it appears that the circulator seeks to defer responsibility for certification. * * *

> 16. When information is stricken on the date line, and other information has been substituted, the face of the sheet does not tell a clear story demonstrating that it was filled out properly. One possible scenario (the "innocent slip of the pen" scenario) is that the circulator signed it, dated it erroneously, realized the error, struck the error, and redated correctly. But another possibility is that the circulator signed improperly—perhaps before witnessing the elector signatures—conveyed the sheets to another person, and that the other person fraudulently altered [his] certification. * * *
>
> 17. On the other hand, where a date has been stricken and another written in, the sheet is accepted if either date would be proper. Also, where the date has been expressed as a range, but it is clear from the face of the sheet that it was dated all at once, the sheet is accepted if the last date in the range would be proper. * * *

Supp. App. 28–30.

After certifying the number of genuine signatures of voters submitted on each signature sheet, each county elections official returns the signature sheets to the chief sponsor of the certificate of nomination with the total number of valid signatures indicated on each separate sheet. Supp. App. 5. Notably, the matter examined by county officials is extremely limited: They simply "compare the signatures of electors on the petition or minutes with the signatures of the electors on the elector registration cards." Or. Rev. Stat. § 249.008; Supp. App. 39. The certification then states the number of signatures believed to be genuine.

If the petition sheets contain a number of signatures apparently sufficient to qualify for the ballot, the chief sponsor files the completed nominating petition with the Elections Division, along with the original petition sheets. Supp. App. 5. The Elections Division then reviews the signature sheets for compliance with state election law requirements. Supp. App. 5. The purpose of that review is to maintain uniformity and consistency in the interpretation and application of the elections law. Supp. App. 5, 38. *See* Or. Rev. Stat. § 246.110.

In the November 2, 2004, election, the Secretary of State issued instructions to all county clerks to follow for verifying the signature sheets for the 2004 Nader for President petition. Supp. App. 4. The instructions directed the counties to screen and reject signature sheets that had circulator signature and date problems. They defined what problems to look for regarding circulator signatures and dates. In the event of any question, the clerks were to fax any problem sheet to the Elections Division for review, prior to verification of signatures, so that the Secretary could determine whether to reject as invalid the entire sheet based on the particular problem.

The Elections Division worked with county election officials throughout the signature verification process, answering their questions regarding which signature sheets should be disqualified. Supp. App. 5. After petitioners received certification from the counties indicating that they had in toto more than the required number of verified signatures, they filed the completed nominating petition with the Elections Division. Intervenor Democratic Party of Oregon filed objections to the signatures on grounds including that a number of signature sheets had been submitted to the counties without page numbers in violation of the state election laws. Service Employees International Union also filed objections. Supp. App. 6.

The Elections Division then reviewed the signature sheets submitted. It rejected 718 signatures for failing to comply

with state election law requirements with respect to the circulator's oath, including sheets that were disqualified by county clerks on those grounds. An additional 10 signatures were disqualified because they were duplicates. Supp. App. 5. After contacting all county clerks to determine the total number of signature sheets that had been submitted to county clerks without page numbers, 2292 signatures were disqualified because they were submitted on unnumbered sheets. Supp. App. 6.

The number of valid signatures that the Nader/Kucera campaign needed to qualify the candidates for the ballot was 15, 306. The Secretary of State determined that the total number of qualified signatures submitted was 15,088. That left the Nader/Kucera campaign 218 short of the number of valid signatures they needed to qualify for the ballot. Supp. App. 7. on September 2, 2004, the secretary advised Mr. Nader that he had failed to gain ballot access for the office of President of the United States.

The next day, petitioners appealed the Secretary's action in the Marion County Circuit Court. In their complaint, petitioners alleged seven substantive claims, four of which were based on Oregon statutory and administrative law principles, one of which was based on the Oregon Constitution, and two of which (their fifth and seventh claims) presented federal law issues. Their fourth claim for relief was that the Secretary cannot lawfully reject signature sheets based on alleged defects in circulator signatures or dates on circulator signatures. Pet. App. 8–11. With respect to the latter claim, petitioners argued that they were unable to identify any defect in signatures or dating in many of the rejected sheets and that the Secretary had not explained what defects existed in them. Petitioners also argued, in part, that the Secretary had no authority to reject signatures as a penalty for circulator error. Pet. App. 9.

The parties disputed whether petitioners were aware of the Secretary's rules and requirements. According to an affidavit of the Elections Director, "[petitioners] obtained a copy of the instructions which the Secretary sent to all county clerks." Pet. App. 4. The instructions to county officials, which were attached as Exhibit 2 of the affidavit, included these:

> Following are procedures we need all counties to follow when verifying the signature sheets for the Nader for President petition.
>
> 1. Counties will initially screen for potential problems with circulator signature and dating of signature sheets.
>
> 2. Counties will highlight with a highlighter the areas of concern on the signature sheet. **Do not** verify any signatures on the sheets that have any potential problems or issues. Once the Secretary of State's office makes a determination on these sheets, the county will be contacted and advised on whether to verify these signatures or to reject the sheet.
>
> 3. The areas to review for concern are:
>
> The circulator signature line is blank or the circulator has signed using initials only. (First name initial with the full last name is sufficient).
>
> There is no date on the circulator date signed line.
>
> Circulator date has been crossed out or modified.
>
> The circulator signed and dated **before** the dates of some or all of the signers.

> Circulator name is a signature stamp.
>
> White out is used on the circulator name or date area.
>
> There are two different circulator names on the certification.
>
> The original signature of a circulator has been crossed out, and a new circulator's signature is inserted.

Kucera, 337 Or. at 398–400 (boldface in original).

Additionally, the Elections Director averred that he discussed candidate petition requirements with Travis Diskin of the Nader campaign on July 30, 2004. Supp. App. 30. A memo memorializing that conversation showed that "Mr. Diskin asked about the requirements for the circulator's certification," and they were explained to him. Diskin was told that circulators must sign their full legal names, not use initials, and must date the certification. If the date of the certification was wrong, they were simply to resign and redate the signature sheet, not cross out the circulator name or modify the date. Supp. App. 30–31. Petitioners provided no evidence to contradict the Elections Director's averment. Notably, the Manual sets forth as a rule the chief sponsor's responsibility to "review with the circulators the requirements for circulating the petition." *See* Supp. App. 11. Thus, if petitioners received a copy of the above instructions, as the Elections Division Director averred, it was their responsibility to convey those instructions to their circulators.

The trial court issued an order and opinion resolving petitioners' third and fourth claims for relief on September 9, 2004. The court rejected their claim "regarding the manner in which the Secretary administered the rules related to the sequential numbering requirement," concluding that "[t]hat re-

quirement * * * is specifically authorized by both statute, [Or. Rev. Stat. §] 249.009, and by an appropriate written administrative rule * * *." Pet. App. 42. It agreed with petitioners' contention, however, that no rule or statute "authorizes the wholesale rejection of signature sheets for errors other than signature sheet format violations." Pet. App. 37. The trial court also opined that no written rule justifies certain of the Secretary's requirements, *viz.*, that "each circulator must sign the circulation certificate with a full signature * * * verifiable by comparison with the circulator's own voter's registration if one exists, or with some other exemplar if a voter's registration form does not exist[.]" Pet. App. 38. The trial court made no express or implicit finding as to whether petitioners had received notice of the challenged rules and procedures before they submitted their signature sheets.

On September 14, 2004, the Secretary challenged the trial court's ruling in the Oregon Supreme Court in a petition for writ of mandamus, as well as a direct appeal of the judgment in the Oregon Court of Appeals, accompanied by a request for certification to the state Supreme Court. The Oregon Supreme Court granted the petition and request for certification and on September 22, 2004, issued an opinion, peremptory writ of mandamus, and appellate judgment requiring the trial court to withdraw its order and enter judgment in favor of the Secretary of State. *Kucera v. Bradbury*, 337 Or. 384, 97 P.3d 1191 (2004).

On September 24, 2004, petitioners applied to this Court for a stay of the Oregon Supreme Court's order pending certiorari review. The Secretary filed his response to that application on September 27, 2004. This Court denied petitioners' application the next day.[1] *See Kucera v. Bradbury*, 125 S. Ct.

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[1] Justice Breyer would have granted the application for stay. Pet. App. 45.

27 (2004). Mr. Nader's and Ms. Kucera's names were not placed on the November 2, 2004 general election ballot as candidates for President and Vice-President of the United States.

After completing the first election cycle in which circulator dating requirements applied, the Secretary deemed it advisable to turn certain applied interpretations concerning circulator certification into more specific rules. With certain amendments, and after public comment, he proposed additional and more specific rules addressing circulator certification, which ultimately were adopted on April 8, 2005. *See* Supp. App. 52–57. The rules address in detail when a petition signature sheet will and will not be rejected for insufficient circulator certification based on defects in dating or circulator signature. They also set forth procedures for verifying by exemplar what initially is deemed insufficient certification and for notifying the chief petitioner or his designee of insufficient certification so that he may provide an alternative exemplar, when Oregon voter registration card signatures are not available for comparison with circulator signatures. Supp. App. 52–57.

REASONS THE WRIT SHOULD BE DENIED

A. Introduction.

In this case, petitioners contend that the Secretary violated their rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution during the November 2, 2004, Oregon general election by applying "unwritten rules" to disqualify a number of their nominating petition signature sheets without notice, resulting in their candidates failing to qualify for placement on the ballot. None of petitioners' claims warrants this Court's review. This case is moot. The doctrine of "capable of repetition but evading review" does not apply, because the Secretary has adopted new administra-

tive rules that will apply in the next general election and are subject to review in the state courts. Petitioners' Fourteenth Amendment claim is not properly before this Court, because petitioners did not adequately preserve it in the state courts. Petitioners' contentions ignore matters that the Oregon Supreme Court decided under principles of settled state law. Finally, the Secretary's rules and procedures were both duly authorized or mandated by the Oregon Legislature and appropriate. Even should this Court consider the merits of petitioners' federal claims, the interests served by the Secretary's rules and procedures far outweigh the purely procedural burden that the regulations place on petitioners.

B. The Oregon Supreme Court's decision

In their complaint in the circuit court, and again before the Oregon Supreme Court, petitioners alleged two federal claims. First, they alleged that the Secretary of State's implementation of a rule disqualifying voter signatures on a nominating petition on the basis of alleged or proven errors by petition circulators in signing, dating, or placing numbers on the sheets, violated the First and Fifth Amendments to the United States Constitution. Second, they alleged that the Secretary's implementation of a rule disqualifying a circulator's signature if it varied from the signature on the circulator's Oregon voter registration card discriminated against Oregon voters who are not registered to vote and violated the First Amendment right of plaintiffs to travel across state lines into Oregon to engage in core political speech and to circulate petition sheets. The Oregon Supreme Court considered all of petitioners' claims, including their federal claims, because "if one or more were correct, it would obviate the necessity of relief in mandamus." *Kucera*, 337 Or. at 405. After carefully considering the facts, the applicable statutory and constitutional legal principles involved, and the trial court's reasoning, the state's highest

court unanimously rejected all of petitioners' claims against the Secretary.

The Oregon Supreme Court first considered petitioners' state law claims. With respect to their fourth claim, it noted that the trial court had premised its ruling on its conclusion that "no statute or rule expressly authorized the Secretary of State to prohibit the counting of otherwise valid signatures of electors that supported a certificate of nomination simply because of arguable violations of signature and dating requirements respecting circulators." *Id.* at 397. After reviewing the applicable state elections law, the Court disagreed. *Id.* at 397–400. Specifically, it found that the Oregon Legislature expressly had delegated to the Secretary authority over the procedures for nominating candidates by individual electors and other elections procedures; that it had given the Secretary the "responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election laws"; and that it had authorized the Secretary to make rules he "considers necessary to facilitate and assist in achieving and maintaining a maximum degree of correctness, impartiality and efficiency in the administration of the election laws." *Id.* at 397–401 (quoting excerpts of Or. Rev. Stat. § 249.009(1), Or. Rev. Stat. § 246.110, and Or. Rev. Stat. § 246.150). The Court similarly noted that the legislature had enacted Or. Rev. Stat. § 246.120, which mandates that the Secretary "prepare and distribute to each county clerk detailed and comprehensive written directives," and that he "assist, advise and instruct each county clerk, on registration of electors and election procedures which are under the direction and control of the county clerk" which the county clerk "shall comply with." *Id.* at 397–98.

The Oregon Supreme Court found that "the Secretary of State exercised his authority under [Or. Rev. Stat. §] 246.120 by issuing written instructions to all county clerks regarding

the verification of elector signature sheets from the Nader campaign, including directions for addressing potential problems with the signature and dating of signature sheets by circulators." *Id.* at 398–99. The Court set forth those written instructions and accepted the state Elections Director's averment that the Secretary's "practice is to accept a purported circulator's signature if there is any reasonable way to do so." *Id.* at 400). It summarized the Secretary's practice:

> In general, state officials rejected signature sheets containing no date or alterations in the date, such as stricken materials, but accepted signature sheets that the circulator had redated and re-signed or sheets that told a "clear story" about their completion and whose circulators apparently had completed the certification properly.

Id. at 400.

The Oregon Supreme Court specifically rejected the trial court's theories that "the signature and date review procedures that the Elections Director had followed in his office were 'unwritten rules,'" It explained:

> It is true that the review procedures that [the Elections Director] described were not themselves written, but that does not render them unlawful. On the contrary, the review procedures are nothing more than the step-by-step process by which the Secretary of State carried out legal authority found elsewhere in statute, in rule, and in the Secretary of State's written instructions to the county clerks. *The review procedures were not, as the trial court's comments appear to suggest, yet another layer of unannounced legal barriers. They were, instead, the methodology by which*

> *the Secretary of State enforced existing legal standards.* The necessity for the review procedures arose in this case because the Secretary of State gave written instructions to the county clerk to return to the Secretary of State for further review all signature sheets "that have any potential problems or issues," and gave them a list of those potential problems. *The review procedures that [the Elections Director] described did not enlarge upon the written list; rather, they merely effectuated it with the goals of insuring that review by his office was a uniform process.*

Id. at 401 (emphasis added). The Court recalled that "[Or. Rev. Stat. §] 249.740(4) requires each circulator to certify on each signature sheet that the signer had signed the sheet in the circulator's presence and that the circulator believed that the signer was an elector registered in the electoral district." *Id.* at 402; emphasis in original). The dictionary definition of "certify," it noted, shows that that "means 'to attest esp. authoritatively or formally * * * to present in formal communication, esp. in a document under hand or seal * * *.'" Pursuant to that legislative directive of a formal attestation, the Secretary adopted an administrative rule requiring circulators to "sign" the signature sheet. *Id.*; Supp. App. 23. Because a "signature is 'the name of a person written with his own hand to signify that the writing which precedes accords with his wishes or intentions," the Secretary plausibly could interpret the requirement of a signature to mean that the circulator must sign his name in full, rather than simply use initials, and so instruct the county clerks. Thus, citing settled state administrative law principles, the Court held that what the Secretary did was clearly authorized and appropriate:

> In adopting the rules set out in the SCMIE [2004 State Candidate's Manual: Individual Elec-

> tors], in issuing written instructions to the county clerks, and in utilizing the circulator signature and date review procedures, the Secretary of State was obtaining and maintaining uniformity in the operation of an election law, i.e., the certification requirement in [Or. Rev. Stat. §] 249.740(4), as [Or. Rev. Stat. §] 246.110 required. *The Secretary of State thus may conclude*, and clearly has so concluded, *that a circulator's failure to comply with the Secretary of State's requirements for circulators certification means that the purported certification is invalid and the signature sheet does not comply with [Or. Rev. Stat. §] 249.740(4).*

Id. at 402–03; emphasis added.

Having reached that conclusion, the Oregon Supreme Court dispensed with the trial court's reasoning quickly. It noted that, because Or. Rev. Stat. § 249.740(4) requires the circulator to certify that the individual signed the sheet *in the presence of the circulator*, an elector's signature, without more, does not show compliance with that requirement. *Id.* at 403; Pet. App. 23; emphasis in original. It explained, "The certification requirement serves to discourage fraud in the execution of signature sheets. The Secretary of State's choice to invalidate a signature sheet if the circulator violates the certification requirement promotes that objective." *Id.* The Court further noted that when several counties failed to comply with the Secretary of State's written instructions, that "threatened a violation of the uniform application of the Secretary of State's requirements for circulator certification." *Id.* at 405; Pet. App. 26. As a matter of state law, then, the Court concluded, "[f]aced with that potential violation of uniformity, the Secretary of State's choice to engage in a post-verification review of signature sheets from noncomplying counties was a permissible one." *Id.* at 405.

Petitioners' other statutory claims also failed. Their first claim failed, because Oregon law does not require the Secretary to include with his decision findings of fact, conclusions of law, or reasons for notifying Nader that his campaign had filed insufficient signatures, as petitioners alleged *Id.* at 406–07; Pet. App. 28. Their second claim—that the Secretary could not lawfully refuse to recognize verified elector signatures on signature sheets containing errors by circulators of the Nader campaign—failed for the same reasons that their fourth claim failed. *Id.* Their third claim—that the Secretary of State should be estopped from refusing to count signature sheets that were not sequentially numbered, because the Nader campaign followed the instruction of elections officials in numbering submitted signature sheets—failed because the campaign's reliance on any such statement would not have been reasonable, in light of published rules. *Id.* at 407–08; Pet. App. 29. In terms of substantive claims, that left only petitioners' state and federal constitutional claims.

The Secretary quotes that portion of the Oregon Supreme Court's opinion in full, because it correctly frames the remaining legal issues before it:

> [Petitioners'] fifth, sixth, and seventh claims for relief assert various constitutional challenges, which we summarized above, to the Secretary of State's disqualification of signature sheets due to errors by circulators in signing and dating the sheets. [Petitioners] contend that a compelling justification must support the state's enforcement of any rule that results in the disqualification of the signatures of registered voters.
>
> We do not dispute that the statutory procedure for nomination by individual electors implicates important aspects of the political lib-

erty and associational freedom of Oregon's electors. However, *[petitioners'] claim that the Secretary of State's action effectively compels them to collect thousands of signatures in addition to the number required by Oregon statute or the state constitution is illusory. [Petitioners], like all political participants, must collect only the number of signatures, and comply with the pertinent signature gathering procedures, that Oregon law requires.* Thus, contrary to [petitioners'] argument, the Secretary of State has not imposed an undue burden on [petitioners'] political freedoms under the state or federal constitutions.

The United States Supreme Court has noted, in an analogous context, that *a state (there, Colorado) "retains an arsenal of safeguards" to protect the integrity of a ballot-initiative process, to deter fraud, and to diminish corruption.* Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182, 204–05, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999). The Court in Buckley specifically cited a state statute that invalidated an initiative "if [the] circulator has violated any provision of laws governing circulation" as one example of a legitimate state safeguard. Id. at 205. The Court also noted that *states "have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally,"* id. at 191, citing as an example Colorado's requirement that petition circulators attach to each petition section an affidavit containing particular factual statements.

> We recognize, of course, that functional differences exist between the initiative process scrutinized in Buckley and the candidate nomination procedure under consideration here. *But, as noted, the underlying signature collection and circulator certification procedures are analogous. For that reason, we conclude that, according to the principles discussed in Buckley, Oregon's circulator certification procedure, and the other procedures discussed above that protect the electoral process from fraud, withstand federal constitutional scrutiny.*

Id. at 408–09; Pet. App. 30–32; emphasis added. Accordingly, the Oregon Supreme Court held that "the Secretary of State's disqualification of signature sheets in this case is not unconstitutional for the reasons asserted by [petitioners]." *Id.*

C. This case is moot.

As discussed above, petitioners' aim in challenging the Secretary's actions in state courts was to obtain an order requiring the Secretary to place the Nader/Kucera ticket on the November 2, 2004, general election ballot. Petitioners' main theory under the federal constitution was that the Secretary had violated their constitutional rights by applying "unwritten rules" to them without prior notice. Without regard to the merits of those factual assertions (which the Secretary disputes), petitioners' "as applied" challenge to the Secretary's actions was specific to the November 2, 2004, general election. That election is over, and the issues presented by the petition in this case are therefore moot.

1. Applicable Legal Principles

Recognizing the mootness problem they face, petitioners cite, without analysis, a number of elections cases in which

this Court held that the issues presented were not moot because they were "capable of repetition yet evading review." Pet. Cert. 4. That doctrine applies "when '(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 187 (1979) (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)). Those requirements must be met in elections cases, as well as in other contexts. *See, e.g., Illinois State Bd. of Elections* ("as applied" equal protection claim challenging Illinois law that effectively required new party or independent candidates to obtain substantially more signatures in mayoral elections than in a statewide election was moot, because the appellant had "presented no evidence creating a reasonable expectation that the Chicago Board [would] repeat its purportedly unauthorized actions in subsequent elections."). Both prongs must be satisfied before this Court will consider the merits of an otherwise mooted claim. *See id.*

2. Petitioners' Due Process Claims

In this case, neither of the requirements for application of the doctrine is met. First, the due process issues in this case are not capable of repetition. As a factual matter, if the Nader campaign was not aware of the Secretary's interpretation of elections law rules in the last presidential election, it certainly is now. There can be no further misunderstanding concerning what is required to properly certify a nominating petition signature sheet. More importantly, after the last election, the Secretary adopted written rules that spell out how elections officials should determine whether the dates and circulator signatures on a signature sheet comply with statutory certification requirements. *See* Or. Admin. R. 165-014-0270; Supp. App. 53–57. Chief petitioners for nominating petitions will have no

viable claims of lack of notice of certification standards in future elections.

Nor has the propriety of the Secretary's past actions evaded review. On or about September 3, 2004, petitioners challenged the Secretary's decision not to place their ticket on the ballot in the Marion County Circuit Court. That court's decision, rendered September 9, 2004, was reviewed by the Oregon Supreme Court, which issued a judgment resolving the case on September 22, 2004. Petitioner had time to request a decision from this Court asking for a stay of the state court's issuance of a peremptory writ of mandamus, which this Court denied on September 28, 2004. Because petitioners had sufficient time to fully litigate the challenged procedures of the Secretary before the November 2, 2004, Oregon general election ballot was printed, it cannot be said that this case evaded review.

3. Petitioners' Right to Travel Claim

The new rules specifically address petitioners' challenge to the Secretary's procedures for verifying out-of-state circulators' signatures. Under the new procedures, if a preliminary determination is made that a certification is insufficient for reasons related to the manner in which a circulator signed the signature sheet, the Elections Division first will compare the signature to the circulator's current Oregon voter registration card signature, if available, and will accept matching signatures. Or. Admin. R. 165-014-0270(5)(a); Supp. App. 55. However, if an Oregon voter registration card bearing the circulator's signature is not available, the Elections Division will compare the certification signature to an alternative exemplar filed with the Elections Division or, if no alternative exemplar has been filed, it will notify the chief petitioner or his representative of the problem, and that person will have an opportunity to submit an alternative exemplar of the circulator's signature. Or. Admin. R. 165-014-0270(5); Supp. App. 55–

56. The new rules thus effectively moot petitioners' claim that the Secretary rejects signatures of out-of-state circulators based on the unavailability of an Oregon voters registration card exemplar, thereby creating a "freedom of travel" violation. Their current complaint is not "capable of repetition." Additionally, for reasons set forth above, it has not "evaded review."

4. Petitioners' First Amendment Claims

The adoption of new administrative rules also moots petitioners' claims that the Secretary's rules and procedures unduly burden the rights of voters and campaigners to place their candidates on the ballot. There is no reason to conclude that the "circulator error" problems that petitioners allege they experienced during the last election will reoccur in the next one. Petitioners' claims are not "capable of repetition" within the meaning of the doctrine on which they rely.

Further, a challenge to the Secretary's new rules obviously would not evade review. Under Oregon's Administrative Procedures Act, "[t]he validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases." Or. Rev. Stat. § 183.400(1). Supp. App. 37–38. "The validity of any applicable rule may also be determined by a court, upon review of an order in any manner provided by law or pursuant to [Or. Rev. Stat. §] 183.480 or upon enforcement of such rule or order in the manner provided by law." Or. Rev. Stat. § 183.400(2). "The court shall declare the rule invalid * * * if it finds that the rule * * * [v]iolates constitutional provisions[.]" Or. Rev. Stat. § 183.400(4)(a). Thus, there exists a state court procedure through which petitioners may challenge the constitutional validity of the rules without fear that their contentions cannot be fully litigated before the next presidential election, three and one-half years away.

Moreover, the fact that the state courts have never passed on the new rules' validity under either state or federal law presents a significant institutional reason for denying review in this case. Petitioners have available to them a legal mechanism in state court to challenge the facial validity of the new rules, at which time state courts can decide whether they violate state statutes or the Oregon or United States Constitutions. Or. Rev. Stat. § 183.400(1); Supp. App. 37. It would be speculative to conclude that the state courts will uphold the rules against all potential challenges. This Court should decline to review the validity of the new rules in order to give state courts the initial opportunity to consider their validity.

D. Petitioner's Equal Protection Claims Are Not Properly Before This Court.

In this Court, petitioners argue that the Secretary's application of state statutes, rules, and internal review procedures violates the equal protection rights of voters who wish to cast votes for independent candidates for federal office. (Pet. Cert. 28–29). That is so in part, petitioners contend, because "state law does not allow write-in votes for such a candidate to be counted except in the extraordinary circumstance where the total write-in vote exceeds the vote for any candidate listed on the ballot[.]" (Pet. Cert. iii). However, petitioners do not demonstrate that they presented their equal protection claim to the trial court. Undoubtedly for that reason, the Oregon Supreme Court did not address it. Under state law, appellate courts may not review claims not preserved in the trial court, unless those claims involve errors apparent on the face of the record. *Ailes v. Portland Meadows, Inc.*, 312 Or. 376, 380–81, 823 P.2d 956 (1991). Because petitioners failed to present an equal protection claim to the state courts in a posture in which it could be reviewed under state law, this Court should not consider such a claim now.

In any event, such a claim would fail, because it is premised on the erroneous understanding that voters have an unqualified right to have their signatures counted towards the nominating total required, even if circulators do not certify them properly. As the Oregon Supreme Court concluded, any interest that voters have in having their signatures counted must be balanced against all voters' interests in having fair and impartial elections, absent of fraudulent conduct. And, in fact, a given campaign need not turn in signature sheets at all. Clearly, disqualifying signature sheets that are not in compliance with rules promulgated to protect Oregon voters' interest in having fair and impartial elections does not offend equal protection principles.

E. The Oregon Supreme Court Applied Settled Principles of Federal Law to Uphold the Secretary's Nondiscriminatory and Reasonable Elections Regulations.

As suggested above, petitioners may contend that their challenges to the Secretary's actions are not moot, because they have challenged the justification for them under federal constitutional principles. Even assuming for the purpose of argument that that is correct, this Court still should not grant review. Petitioners' claim that the requirements for certifying nominating petition signature sheets violate the rights of prospective candidates and voters under the First and Fifth Amendments to the United States Constitution is meritless.

1. Petitioners' claims have been largely resolved against them under state law.

As a preliminary matter, petitioners ignore that major factual and legal predicates of their federal claims were decided against them under principles of settled state law. Petitioners ask, for example, "What is the state interest in applying unwritten rules to reject signature sheets because the Defendant does not like the look of the circulator's signature or because

the date is corrected in any way?" (Pet. Cert. 20). The answer is that under state law, the Secretary did *not* apply "unwritten rules" but, rather, properly reviewed petitioners' signature sheets for compliance with existing statutory and rule requirements for certification. Similarly, petitioners complain that the Secretary's "policies deprive the signor of any assurance that her valid signature will be counted, because he is disqualifying entire sheets of elector signatures on bases that have nothing to do with their validity." (Pet. Cert. 22). As a matter of state law, however, improperly certified signature sheets are *not* valid, because they do not demonstrate that the individual has signed the sheet in the presence of the circulator, an Oregon statutory requirement aimed at discouraging fraud in the execution of signature sheets. *Kucera*, 337 Or. at 402. Throughout their analysis, petitioners' assessment of the burden placed on them compared with the Secretary's justification for his rules is skewed, at times dramatically, by their reliance on factual and legal assertions that have been rejected under state law. The issues they present are essentially fact-bound or represent mere disagreement with the Oregon Supreme Court's legal conclusions about the Secretary's authority and the responsibilities of his office.

Petitioners' contention that there is "no compelling or even important or even plausible state interest that is achieved by rejecting signature sheets that are not sequentially numbered" exemplifies that problem. Pet. Cert. 25. Petitioners first argue that the Secretary's staff advised them to submit their signature sheets with no initial numbering on them. Pet. Cert. 24. The Oregon Supreme Court specifically rejected the notion that that negated the Secretary's authority not to count such signature sheets, observing that Or. Rev. Stat. § 249.009(1)(b) directs the Secretary to prescribe a system of numbering, which the Secretary did, by rule. *Kucera*, 337 Or. at 407. Under state law, in light of published statute and rule, it was not

reasonable for the Nader campaign to rely on alleged misadvice by the Secretary's staff. *Id.* at 407–08; Pet. App. 29–30.

Similarly, petitioners assert that "[t]here is nothing in statute or rules applicable to nominating petitioners that failing to number the sheets disqualifies all signatures on those sheets." Pet. Cert. 26. The Oregon Supreme Court expressly concluded that Oregon law authorizes precisely that. *Kucera*, 337 Or. at 401–03; Pet. App. 23–25. In short, most of petitioners' contentions have been resolved under state law. This Court should not reexamine them here.

2. This Court reviews the Secretary's regulations to determine whether they are reasonable and nondiscriminatory.

A second flaw in petitioners' arguments on the merits is that petitioners misstate the level of scrutiny applicable to reasonable and nondiscriminatory procedural election regulations such as the ones at issue here. This Court starts from the premise that the conduct of the elections process, even in the presidential context, is a constitutional obligation of the states and that the process commonly and properly requires a significant degree of detailed regulation:

> We have recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process." *Storer v. Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 1279, 39 L. Ed. 2d 714 (1974). To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes.

Anderson v. Celebrezze, 460 U.S. 780, 788 and n. 9 (1983). While recognizing that such regulations inevitably affect "at

least to some degree" voting and associational rights, the Court has made absolutely clear that decisions that affect ballot access are not to be given the same strict level of constitutional scrutiny applied to expressive claims in other contexts because to do so "would undermine the ability of the States to operate elections fairly and efficiently" and "tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Anderson*, 460 U.S. at 788; *Storer*, 415 U.S. at 730; *Burdick v. Takashi*, 504 U.S. 428, 433, 438 (1992).

This Court has declined to apply a test of strict scrutiny, except in cases where the content of the regulation itself places a "severe" restriction on ballot access. *Burdick*, 584 U.S. at 438; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). The Court instead has adopted a test for ordinary procedural election rules and applications that will uphold reasonable and non-discriminatory restrictions:

> When a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

Burdick, 504 U.S. at 434 (quoting and citing *Anderson*, 460 U.S. at 788–89 and n. 9); *Timmons*, 520 U.S. at 354. As discussed below, under that standard, the regulations in this case pass constitutional review easily.

3. The state's interest in holding fair and efficient elections far outweighs the minimal burdens that the Secretary's rules place on nominating petition gatherers.

Finally, petitioners contend that in the November 2, 2004, election, the Secretary provided no compelling or even important justification to justify his refusal to count signature sheets that did not comply with certification and pagination rules. According to petitioners, "[t]he implementation of a rule

which disqualifies voter signatures on the basis of alleged (or proven) errors by circulators (in signing, dating, or placing numbers upon the sheets) significantly burdens the collection of signatures by precluding from the verification process, without an exacting standard of compelling justification, thousands of signatures." (Pet. Cert. 19–23). Without identifying any precedent to support their position, petitioners conclude that, because the rules impair voters' franchise rights, the Oregon Supreme Court must have incorrectly applied the federal constitution to their case. (Pet. Cert. 29–30).

Petitioners' existing as applied challenge, or potential facial challenge, to the newly-adopted administrative rules simply fails. Petitioners complain bitterly about circumstances that they allege occurred during the recent Oregon presidential election. Interestingly, even in the November 2, 2004, general election, petitioners were successful in properly certifying and numbering signature sheets containing 15,088 valid signatures, just 218 short of the number needed to place their candidates on the Oregon ballot. Those facts strongly support the inference the Secretary's rules did not, and in the future will not, unfairly impair petitioners' ability to have properly certified and numbered signature sheets counted toward the number needed. Petitioners do not identify any particular burden that complying with published certification and sequential numbering rules would impose on them in future elections.

Petitioners also have failed to recognize the important interests justifying the certification, dating, and numbering rules challenged here. Again, this Court has recognized the state's "important regulatory interests" in this context to include the prevention of fraud, the maintenance of integrity, fairness, and efficiency, and the need for order and trustworthy results. *E.g., Timmons*, 520 U.S. at 354; *Anderson*, 460 U.S. at 788; *Storer*, 415 U.S. at 730. Those are precisely the interests that the Oregon legislature has articulated in Or. Rev. Stat. §

246.110 and Or. Rev. Stat. § 246.150 in charging the Secretary of State, as the state's chief elections officer, with the responsibility of interpreting and administering Oregon's election laws. This Court also has made it clear that it does "not require elaborate, empirical verification of the weightiness of the State's asserted justifications" for reasonable procedural or administrative burdens on ballot access. *Timmons*, 520 U.S. at 364. Nevertheless, there was ample evidence in this case to support the Oregon Supreme Court's conclusion that the state's interests in preventing fraud and running an fair, orderly, and efficient election were sufficient to justify the minimal burden placed on petitioners by the Secretary's rules and internal review procedures.

In the state courts, the Secretary introduced several affidavits and testimony from persons involved in the elections process, including the Elections Director, explaining the reasons for his rules and policies. With respect to the sequential numbering requirement, the Elections Director averred:

> The purpose * * * is twofold: it allows officials to readily locate any sheet or page of the petition to which objections may be made or filed, and second, to avoid the possibility of fraud which may occur by tampering with sheets after county verification. The numbers are necessary to allow the counties to create a database in order to check for duplicates. Requiring numbered pages prior to submittal also shows that all pages have been submitted by the chief sponsor of the petition, and it prevents tampering by insertion of additional signatures after a petition has been filed.

Supp. App. 6–7. (Emphasis in original). Similarly, the affidavit of Jeannie Berg, the Election Protection Coordinator for America Coming Together, has averred that the prior sequen-

tial numbering rule serves to make the Chief Sponsor accountable for his submissions to the county; shows that the signatures were gathered lawfully and that the signature sheets comply with the applicable standards; and requires the Chief Sponsor to exercise control, thereby increasing accountability and helping to deter fraud. Supp. App. 334. In short, the requirement helps ensure the integrity and efficiency of Oregon's nominating process. And the benefit to the system from these rules runs both directions. For example, it helps protect nominating signature gatherers themselves by ensuring that the county returns all of the sheets they submitted to it. It also helps to prevent one campaign from discrediting another by adding fraudulent sheets.

The Secretary's certification and dating requirements also serve important purposes. As the Elections Director stated:

> [T]he certification requirement and signature verification process do help disclose suspicious signatures and likely fraud. For example, in 2000 Kelly Highley was convicted of signature fraud, after Yamhill County personnel examining the signatures suspected forgeries on sheets certified by Ms. Highley. Even in the most recent initiative cycle we have observed several potential cases of criminal signature fraud[.]

Supp. App. 27–28. In Berg's affidavit, she stated that in her experience, circulators had been able to deny responsibility for obvious fraud by claiming that they did not collect a signature. They also had given inaccurate information about their addresses, in order to avoid being held responsible. In her opinion, "any rule that strengthens the Secretary's ability to accurately identify the circulator and eliminate circulator excuses deters fraud." Supp. App. 35. Berg also explained that she recommended the dating requirement to the Elections Director in 2002 to "help hold circulators more accountable" in investigating fraud. She gave a specific example of how the

absence of a dating requirement allowed a particular circulator to argue it was not he who submitted a forged signature. Supp. App. 33–34.

That and other evidence provided the Oregon Supreme Court ample evidence from which to conclude that the challenged procedures were justified as non-burdensome means of ensuring that Oregon's elections are fair, orderly, and efficient. The rules on prior sequential numbering, circulator signatures, and circulator dating of signature sheets, derive from and implement the Secretary's lawful authority. None burdens expression; the rules are garden-variety regulatory procedures of the sort recognized as legitimate in *Timmons* and *Buckley*. They are part of an overall electoral mechanism that imposes limited procedural obligations on the candidate and supporters, and they exist to prevent fraud and to insure the accountable, uniform, fair and efficient operation of the electoral process. They are reasonable, nondiscriminatory procedural requirements, and the Oregon Supreme Court, in its unanimous decision, merely applied principles previously approved by this Court to uphold them.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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April 20, 2005

Supreme Court, U.S.
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No. 04-872

In the Supreme Court of the United States

SANDRA KUCERA, SARAH THERESE WINDER, KRISTIN ZUBEL, NATALIE BOLTON, PHILLIP SALISBURY, SAMANTHA BERG, TIMOTHY JOHNSON and GREGORY KAFOURY,

Petitioners,

v.

BILL BRADBURY, Secretary of State, DEMOCRATIC PARTY OF OREGON, JOHN NEEL PENDER and JAMES EDMUNSON,

Respondents.

On Petition for Writ of Certiorari to the Oregon Supreme Court

RESPONDENT BILL BRADBURY'S SUPPLEMENTAL APPENDIX

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

SANDRA KUCERA, an elector of Oregon and candidate for Vice President of the United States, SARAH THERESE WINDER, KRISTIN ZUBEL, and NATALIE BOLTON, each an elector of Oregon and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice-President of the United States and as a circulator of said nominating petition, PHILLIP SALISBURY and SAMANTHA BERG, each an elector of and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice-President of the United States, TIMOTHY JOHNSON, a circulator of said nominating petition who is not an elector of Oregon, GREGORY KAFOURY, an individual, an elector of Oregon and Co-Chair, Nader for President 2004 in Oregon,

Plaintiffs,

v.

BILL BRADBURY, Secretary of State,

Defendant.

Case No. 04C-18259
Honorable Paul J. Lipscomb

AFFIDAVIT OF JOHN LINDBACK

STATE OF OREGON)
) ss.
County of Marion)

I, John Lindback, being first duly sworn, depose and say:

1. I am the Director of the Elections Division in the Oregon Secretary of State's office and have served in that capacity for approximately the past three years. My responsibilities as the Director of the Elections Division include overseeing the process to determine whether a certificate for nomination of a candidate by individual electors qualifies the candidate for placement on the ballot.

2. I make this affidavit to summarize, to the extent pertinent, the procedures to determine whether to qualify a candidate for the ballot in Oregon by a nomination petition filed by individual electors.

Commencing Certificate of Nomination by Individual Electors

3. A candidate for public office may be nominated to partisan office by other than a major political party. A minor political party, assembly of electors or individual electors may nominate one candidate for each partisan public office to be filled at the general election by preparing and filing a certificate of nomination as provided in ORS 249.712 to 249.850.

4. Before beginning to circulate the certificate of nomination, the chief sponsor of the certificate shall file a signed copy of the prospective certificate with the Elections Division for approval. ORS 249.740.

5. Once the chief sponsors receive approval of the proposed certificate, they may begin gathering signatures on the approved signature sheets. A proposed certificate for nomination of Ralph Nader and Sandra Kucera as independent candidates for President and Vice President of the United States in

the 2004 General Election was approved for circulation for signatures.

6. Each elector signing a certificate of nomination made by individual electors shall include the residence mailing address of the elector. ORS 249.740(2).

7. The circulator is also required to certify on each signature sheet that the individuals signed the sheet in the presence of the circulator and that the circulator believes each individual is an elector registered in the electoral district. ORS 249.740(4). The sign and date rules are designed to prevent fraud.

8. The legislature has provided that "[n]o signature in violation of the provisions of this chapter shall be counted." ORS 249.008(1).

Submission of Signatures to the County Clerk for Verification

9. To qualify for the ballot based upon a certificate of nomination by individual electors, a certificate is required to contain a number of signatures of electors in the electoral district equal to not less than one percent of the total votes case in the electoral district for which the nomination is intended to be made, for all candidates for presidential electors at the last general election. ORS 249.740(1).

10. Before a petition for candidate nomination by individual electors is submitted to the Secretary of State for filing, it must be submitted to the county clerk for verification of the genuineness of signatures. The county clerk verifies on each signature sheet the number of signatures that are genuine signatures of registered voters within the county. The certificate is prima facie evidence of the facts stated in it. A signature not included in the number certified to be genuine by the county elections official "shall not be counted" by the Secretary of State when the petition is filed. ORS 249.008(1).

11. The legislature has directed the Secretary of State to promulgate rules to "prescribe a system for numbering all signature sheets" for certificates of nomination by individual electors, nominating or recall petitions, minutes of an assembly of electors and minor political party formation petitions. ORS 249.009(1)(b).

12. By rule, the Secretary has designated the 2004 State Candidate Manual: Individual Electors (Manual) and associated forms as the forms and procedures to be used by nonaffiliated candidates filing and running by individual electors for state elective office, such as Ralph Nader. OAR 165-010-0005(5). A copy of the Manual is attached as Exhibit 1.

13. The Manual expressly provides that "before submitting the signature sheets to the appropriate county elections official for signature verification, the chief sponsor must...[w]ithin each individual county, sequentially number each signature sheet in the space provided." Manual at 4.

14. The plaintiffs obtained a copy of the instructions which the Secretary sent to all county clerks. A copy of those instructions is attached as Exhibit 2 (from Travis Diskin Affidavit).

15. The Secretary of State issued instructions to all county clerks to follow for verifying the signature sheets for the Nader for President petition. A copy of those instructions is attached as Exhibit 3. The instructions direct the counties to screen and disqualify signature sheets that had circulator signature and date problems. The instructions defined what problems to look for regarding circulator signatures and dates. In the event of any question, the clerks were instructed to fax any problem sheet to the Elections Division for review, prior to verification of signatures, so that the Secretary could determine whether to disqualify the sheet based on the particular circulator signature or date problem.

16. The Election Division worked with county election officials throughout the signature verification process, and answered their questions regarding which signature sheets should be disqualified.

Review of Nominating Petition by Elections Division

17. Each county elections official certifies the number of genuine signatures submitted on each signature sheet, and returns the signature sheets to the chief sponsor of the certificate of nomination with the total number of valid signatures.

18. If the petition contains the total number of signatures needed to qualify for the ballot or more, the chief sponsor files the completed nominating petition with the Elections Division, along with the original petition sheets. The chief sponsor is not required to submit the sheets to the Secretary of State in sequential numbered order, only to the county clerk.

19. The Nader/Kucera campaign filed all signatures certified to be genuine by the county elections officials with the Elections Division.

20. The Elections Division then reviewed the signature sheets for compliance with state election law requirements. The purpose of the review by the Elections Division is to maintain uniformity and consistency in the interpretation of the elections law.

21. The Elections Division rejected 718 signatures for failing to comply with state election law requirements, such as sheets that violated the circulator sign and date rules and sheets that were totally uncertified by a county. An additional 10 signatures disqualified because they were duplicates. Other signatures were rejected for failure to provide an elector residence address, since the use of a post office box is not acceptable, or for errors in a county's calculation of the number of genuine signatures on each page.

22. Objections to the signatures were filed with the Secretary of State by the Service Employees International Union. Copies of those objections are attached as Exhibits 4-7. The union objected on a number of grounds, including duplicate signatures, improper circulator signatures, dating problems, and use of post office address instead of residence address. In addition, the union objected that a substantial number of signature sheets had been submitted to the counties without page numbers in violation of state election laws.

23. Objections to the signatures were filed by Roy Pulvers, on his own behalf as an individual elector, and on behalf of the Democratic Party of Oregon, on many of the same grounds. Copies of those objections are attached as Exhibits 8-14.

24. The petitioners also submitted letters. Copies of their letters are attached as Exhibits 15-17.

25. The Elections Division reviewed the objection that unnumbered signature sheets had been filed. The Elections Division contacted the county clerks to determine the total number of signature sheets submitted to county clerks without page numbers. Many counties rejected unnumbered signature sheets, requiring petitioners to number all sheets prior to submittal. In other cases, petitioners mailed in unnumbered sheets, or turned in unnumbered sheets and left before the error was detected by the county clerk. In those circumstances, the counties numbered the sheets.

26. Based upon the information provided by each county, signature sheets containing 2292 signatures were disqualified solely for the reason that they were submitted unnumbered to counties.

27. The purpose of the rule requiring the petitioner to consecutively number all signature sheets prior to submittal to county clerks for signature verification is twofold: it allows officials to readily locate any sheet or page of the petition to

which objections may be made or filed, and second, to avoid the possibility of fraud which may occur by tampering with sheets after county certification. The numbers are necessary to allow the counties to create a database in order to check for duplicates. Requiring numbered pages prior to submittal also shows that all pages have been submitted by the chief sponsor of the petition, and it prevents tampering by insertion of additional signatures after a petition has been filed. Here, the chief sponsors submitted 1062 unnumbered signature sheets -- most submitted in the last few days before the filing deadline – contrary to the requirement in the Manual that signature sheets "*must*" be numbered by a chief sponsor "*before*" submittal to the county election officials for signature verification.

28. The number of valid signatures that the Nader/Kucera campaign needed to qualify the candidates for the ballot was 15,306. The Secretary of State determined that the total number of qualified signatures submitted was 15,088, leaving Nader/Kucera 218 short of the 15, 306 valid signatures needed to qualify for the ballot.

DATED this 7th day of September, 2004.

/s/ John Lindback
JOHN LINDBACK

SUBSCRIBED AND SWORN to before me this 7th day of September, 2004.

/s/ Shannon M. Ross
Notary Public for Oregon
My Commission Expires: 5/7/2008

Filing Certificate of Nomination by Individual Electors (ORS 249.720(1)(e) and 249.740)

The following information for nonaffiliated (independent) candidates is provided in the order in which the activities generally occur and includes explanations and time frames for each activity.

ALL CANDIDATES FOR PUBLIC OFFICE

Qualifications for various public offices differ. Before filing, review the constitutional and statutory requirements of the office for which you plan to declare your candidacy. Candidates for partisan offices file under ORS chapter 249. February 26, 2004, is the last day for a candidate filing by petition of individual electors to register as non-affiliated to meet the requirement that the candidate not be a member of a major or minor political party within 180 days of the filing deadline.

Warning: *If a person has filed nominating petitions or declarations of candidacy for more than one lucrative office without first filing a written withdrawal, all filings by the person are invalid. ORS 249.013(3).*

SECRETARY OF STATE

Whenever requested, the Elections Division provides the approved candidate filing forms:

- Certificate of Nomination by Individual Electors (SEL 114);
- Petition for Independent Nomination Signature Sheet (SEL 122);
- Statement One or More/No Petition Circulators Will Be Paid (SEL 300); and
- Statement of Organization (one of the following must be filed):

-Candidate's Statement of Organization (SEL 220).

-Statement of Organization Designation of Political Committee and Appointment of Treasurer and Directors (SEL 221).

If the chief sponsor of a nominating petition by individual electors are receiving contributions or making expenditures that will not be reported by the prospective candidates, the individuals are required to establish a political committee by filing a Statement of Organization Designation of Political Committee and Appointment of Treasurer and Directors (SEL 221) and must file contribution and expenditure reports.

Warning: *All signature sheets must be approved in writing by the Elections Division before circulating. Failure to do so will result in the rejection of those signature sheets.*

CHIEF SPONSOR OF CERTIFICATE

Step 1:

The candidate files a Candidate's Statement of Organization (SEL 220) with the Elections Division unless the candidate:

- serves as the candidate's own treasurer;
- does not already have an open principal campaign committee; and
- does not expect to receive or spend more than $300 for the entire election.

If the candidate meets these three requirements, the candidate is not required to file a Statement of Organization or contribution and expenditure reports. However, if at any time that candidate exceeds $300 in either contributions or expenditures, the candidate must then file a Statement of Organization and contribution and expenditure reports. The $300 includes personal funds spent for any campaign-related costs, such as any expense incurred in circulating a nominating petition and paying a voters' pamphlet statement filing fee.

Note: *Most candidates for federal office in Oregon must file their campaign finance information with the Federal Elections Commission (1-800-424-9560). Candidates for United*

State Senator must file their campaign finance information with the Secretary of the Senate (202-224-0322) at: Office of Public Records, 232 Hart Senate Office Building, Washington, DC 20510-7116.

When to File

Within three business days of receiving a contribution or making an expenditure, but no later than when the Certificate of Nomination by Individual Electors (SEL 114) is filed. See the *2004 Campaign Finance Manual* for specific guidelines and instructions.

If the candidate has an established principal campaign committee the candidate or treasurer must file an amended Candidate's Statement of Organization (SEL 220) not later than the date of the filing of candidacy, to reflect any changes (designation of office sought, applicable election, etc.). A candidate may have only one principal campaign committee.

***Note:** If filing for a new office involves changing filing officers, e.g., county to state, refer to the "Changing Office" section of the 2004 Campaign Finance Manual.*

Step 2:

Before circulating the nominating petition, the chief sponsor files a prospective petition with the Elections Division. See pages 12 and 13 of this manual for signature sheet requirements.

CHECKLIST FOR FILING A CERTIFICATE OF NOMINATION

Below is a checklist of all the components required to file a certificate of nomination. Check that you have not overlooked any of the components and that all of the forms have been completed in their entirety.

☐ Certificate of Nomination by Individual Electors (SEL 114);

☐ Statement One or More/No Petition Circulators Will Be Paid (SEL 300); and

☐ Petition for Independent Nomination Signature Sheet (SEL 122) with line one signed and completed by the candidate.

SECRETARY OF STATE

As soon as possible, the Elections Division reviews the prospective petition for the required information. When the prospective petition complies with all requirements, the Elections Division will give written approval to circulate the petition and will advise the chief sponsor of the number of signatures required.

CHIEF SPONSOR OF CERTIFICATE

Step 1:

Before circulating the nominating petition for signatures, the chief sponsor reviews with the circulators the requirements for circulating the petition. See page 13. The guidelines are:

- All signers must be active registered voters within the candidate's electoral district;
- All signers on any one petition sheet must be registered in the same county;
- All signatures must be original signatures;
- All signatures must be personally witnessed by the petition circulator and the circulator's certification must be completed and dated after all signatures have been collected; and
- No additional signatures may be added to that signature sheet once the circulator has signed the certification and dated the sheet.

Warning: *Violations of the circulator requirements may result in conviction of a felony with a fine of up to $100,000 and/or prison for up to five years.*

Step 2:

Before submitting the signature sheets to the appropriate county elections official for signature verification, the chief sponsor must:

- Sort the signature sheets by county;

Within each individual county, sequentially number each signature sheet in the space provided; and

- Submit signature sheets to the appropriate county elections offices for verification, in sufficient time for the verification process to be finished before submitting the completed nominating petition to the Elections Division.

COUNTY ELECTIONS OFFICIAL

As soon as possible, the county elections official certifies the signatures and returns the signature sheets to the chief sponsor of the certificate of nomination with the total number of valid signatures.

CHIEF SPONSOR OF CERTIFICATE

The chief sponsor files the completed nominating petition with the Elections Division. The petition consists of:

- New Filing of Certificate of Nomination by Individual Electors (SEL 114), either:

–Endorsed on the filing form by the nominee;

-OR-

–Endorsed on an attached acceptance statement from the nominee; and

Note: If the acceptance statement is not submitted with the certificate of nomination it may be submitted up to the filing deadline day.

- Verified signature sheets with the sufficient number of signatures.

When to File

No sooner than September 15, 2003, and no later than 5:00 p.m., August 24, 2004, for the 2004 General Election.

General Information

The following information gives a general overview of other procedures relating to candidates filing for office, including submitting a voters' pamphlet statement, withdrawal of candidacy, contribution and expenditure reporting, conduct of elections, signature sheet requirements and definitions of election law terminology.

State Voters' Pamphlet (ORS Chapter 251)

A federal or state candidate may file a statement for inclusion in the state voters' pamphlet. A county candidate, metropolitan service district candidate or candidate of a city with a population of 50,000 or more may file a statement for inclusion in the state voters' pamphlet if no county voters' pamphlet is published.

SECRETARY OF STATE

The Secretary publishes and distributes the state voters' pamphlet. Candidate information to be published includes:

- Candidate photograph;
- Office for which the candidate has filed;
- Candidate's name and party affiliation;
- Candidate's required information (occupation, occupational background, educational background and prior governmental experience);
- Candidate's optional information (the candidate's statement of reasons for seeking nomination or election); and
- Name of the candidate or the candidate's principal campaign committee that provided the candidate's information.

Voters' Pamphlet Distribution

The mailing of the voters' pamphlet must be completed no later than October 13, 2004, for the 2004 General Election.

CHECKLIST FOR FILING A VOTERS' PAMPHLET STATEMENT

Below is a checklist of all the components required to file a voters' pamphlet statement. Check that you have not overlooked any of the components and that all of the forms have been completed in their entirety.

☐ One original and two identical copies of Candidate's Statement for State Voters' Pamphlet (SEL 430);

☐ A Statement of Endorsement (SEL 400) if the candidate's statement uses the name or title of another person or organization as supporting or endorsing the candidate. A separate Statement of Endorsement must be filed for each person or organization named, unless the statement of the person or organization is a quotation, identified by source and date, which has been previously published;

☐ Phone numbers and fax numbers, if available, for possible contact by the Elections Division for any corrections;

☐ Appropriate voters' pamphlet filing fee: and

☐ Two identical 5" X 7" black and white photographs (ORS 251.075):

-shall be a conventional photograph with a plain background;

-shall show the face or the head, neck and shoulders of the candidate;

-shall not be more than four years old when the portrait is filed;

-shall not include the hands or anything held in the hands of the candidate;

-shall not show the candidate wearing a

judicial robe, hat or a military, police or

fraternal uniform; and

-shall not show the uniform or insignia of any organization.

When to Submit Forms and Photographs

No later than 5:00 p.m. on August 24, 2004, for the 2004 General Election.

SECRETARY OF STATE

Step 1:

The Elections Division reviews "required information" submitted on Candidate's Statement for State Voters' Pamphlet (SEL 430), photographs and statements of endorsement for compliance.

The review must be completed no later than the third business day after the voters' pamphlet filing deadline, 5:00 p.m., August 27, 2004.

Step 2:

If any of the reviewed material is insufficient, the Elections Division shall attempt to contact the candidate regarding the insufficiencies no later than the fifth business day after the voters' pamphlet filing deadline, 5:00 p.m., August 31, 2004.

STATE CANDIDATES

Upon notification of insufficiencies, the candidate may provide corrections to the Elections Division no later than the seventh business day after the voters' pamphlet filing deadline, 5:00 p.m., September 2, 2004. If revisions are not received by the seventh day, the Elections Division will take the appropriate action pursuant to ORS 251.087(5).

Withdrawal of Candidacy or Nomination (ORS 249.830)

ALL CANDIDATES

In order to withdraw from candidacy or nomination, a candidate must file a Withdrawal of Candidacy or Nomination (SEL 150).

When to Withdraw

No later than 5:00 p.m. on August 27, 2004, for the 2004 General Election.

Contribution and Expenditure Reporting (ORS Chapter 260)

Every candidate and prospective candidate is required to establish a principal campaign committee within three business days of receiving or spending any money to support the candidacy unless the candidate:

- serves as the candidate' own treasurer;
- does not already have an open principal campaign committee; and
- does not expect to receive or spend more than $300 for the entire election.

If the candidate meets these three requirements, the candidate is not required to file a Statement of Organization or file contribution and expenditure reports. However, if at any time the candidate exceeds $300 in contributions or expenditures, the candidate must file a Statement of Organization and contribution and expenditure reports.

This includes expenditures of personal funds by the candidate or treasurer, such as payment of the filing fee if the candidate files by declaration, any costs related to circulating a nominating petition, and any voters' pamphlet costs.

Note: *Most candidates for federal office in Oregon must file their campaign finance information with the Federal Elec-*

tions Commission (1-800-424-9560). Candidates for United State Senator must file their campaign finance information with the Secretary of the Senate (202-224-0322) at: Office of Public Records, 232 Hart Senate Office Building, Washington, DC 20510-7116.

Note: If filing for a new office involves changing filing officers, e.g., county to state, refer to the "Changing Office" section of the 2004 Campaign Finance Manual.

ALL CANDIDATES

A candidate or the candidate's treasurer files contribution and expenditure reports for the election. "Candidate" includes:

- A candidate who files for office;
- A candidate who withdraws or is disqualified;
- An individual who files a prospective petition for candidacy, even if signatures are never filed; and
- An individual who has received a contribution or made an expenditure to secure the nomination or election to any public office at any time, whether or not the office for which the individual will seek nomination or election is known when the solicitation is made, the contribution is received and retained or the expenditure is made, and whether or not the name of the individual is printed on a ballot.

Oregon election law requires all candidates or their principal campaign committees to submit timely and accurate contribution and expenditure reports. All candidates and committees must maintain detailed records of all contributions received and expenditures made. The statutes on campaign finance establish accounting periods and filing deadlines for reports of contributions and expenditures and specify the information that must be included in the reports. In addition, the statutes provide for civil penalties up to $10,000 for filing late or insufficient reports.

Note: *If a candidate receives contributions or makes expenditures greater than $2000 before May 18, 2004, the candidate must file contribution and expenditure reports for the 2004 Primary Election.*

A candidate or committee that does not expect to receive or spend more than $2,000 to support a candidacy **may** qualify to file a Certificate of Limited Contributions and Expenditures (PC 7). See the *2004 Campaign Finance Manual* for information on who is eligible to file a certificate.

The candidate and treasurer are jointly responsible for the committee and for filing the contribution and expenditure reports.

If the treasurer violates any campaign finance regulations, the candidate is also in violation.

State candidates and committees that receive and expend more than $50,000 in an election must file their detailed reports by electronic transmission.

See the *2004 Campaign Finance Manual:*

- To determine when your committee is required to file reports;
- For the appropriate forms for filing the reports; and
- For instructions on how to complete the contribution and expenditure report forms; and
- For format requirements for filing reports electronically.

Conduct of Elections (ORS Chapter 254)

SECRETARY OF STATE

The Elections Division prepares and files with the county elections official a statement of candidates and measures for placement on the ballot.

The statement must be filed no later than 5:00 p.m. on September 2, 2004, for the 2004 General Election.

For 2004 only, the statement for Presidential and Vice Presidential candidates must be filed no later than September 8, 2004.

COUNTY ELECTIONS OFFICIAL

Step 1:

The county elections officials conduct the election on November 2, 2004.

Step 2:

The county elections official delivers the abstract of election results for national and state offices to the Elections Division no later than November 22, 2004, for the 2004 General Election.

SECRETARY OF STATE

The Elections Division completes the post-election procedures:

- Canvasses county abstracts and issues proclamation declaring results of the election; and
- Issues certificates of election to national and state candidates. The post-election procedures must be completed no later than December 2, 2004, for the 2004 General Election.

Signature Sheet Requirements (ORS 249.740)

All signature sheets must be approved in writing by the Elections Division before circulating. Failure to do so will result in the rejection of those signature sheets.

SIGNATURE SHEET REQUIREMENTS

Each signature sheet shall include:

- Candidate's name, office for which the candidate is running and district or position number;
- Statement that one or more/no petition circulators will be paid;
- Statement that signers on any one signature sheet must be active registered voters from the same county;
- Area for placing the petition identification number;
- Area for placing the signature sheet number;

Petition circulator's certification stating that each person who signed the petition did so in the circulator's presence and the circulator believes each signer is an elector;

- Area for providing date when circulator signed certification;
- Area for placing the county elections official's certification;
- Ten (10) signature lines unless a variation is approved by the Secretary of State; and
- Each signature line will include spaces for:

-Signature (required);
-Printed name; *
-Residence address; and*
-Date of signing petition. *

*The fields are required to be on the signature sheets. However, an elector's printed name, residence address and date they signed the petition are not mandatory under Oregon law. These information fields, while optional, provide valuable assistance to county elections officials who are performing the signature verification. If these fields are not completed, the signatures may still be submitted for signature verification. If the county elections official can determine from the signature alone that the elector was an active registered voter at the time the elector signed the petition, that signature will count to-

ward the total signature requirement for the petition. If no date is provided by the elector, the signatures are considered valid only if the county elections official determines that the elector was an active registered voter during the period beginning the date the petition was approved for circulation through the date of signature verification.

Warning: Circulators are advised to encourage signers to complete the optional information whenever possible. Failure to provide the optional information increases the possibility that the signature cannot be confirmed to be that of an active registered voter, and thus reduces the chances of the petition having adequate verifiable signatures to complete the nominating petition.

SIGNATURE SHEET FORMAT

The format to be followed in preparing candidate signature sheets shall be:

- Standard 8-1/2" x 11" size paper;
- At least 20 pound (weight) uncoated paper;
- Printed on white or pastel colored paper stock to render text readable and enable election officials to readily verify signatures; and
- Size and style of type are left to the discretion of the petitioner, as long as it is deemed readable and approved for circulation by the Elections Division.

Warning: *Logos, slogans, advertisements, party affiliation, etc. or any symbol or language which may be construed as advocacy are not permitted on the cover or signature sheet. Failure to comply with this requirement may result in rejection of those sheets and disqualification of those signatures.*

***Warning:** Any proposed variation to an approved signature sheet must be resubmitted and approved by the Elections Division before circulating. Failure to do so will result in the rejection of those signature sheets.*

Petition Signer Requirements (ORS 249.740)

Electors' signatures on candidate nominating petitions must be verified by the appropriate county elections official before filing the completed petition with the Elections Division. Requirements for signers include:

- Signers on any one signature sheet must be active registered voters in the same county; and

Each signer must be an active registered voter of the candidate's electoral district at the time of signing the petition.

Circulator Requirements (ORS 249.740)

The circulator of the candidate nominating petition must sign the circulator's certification, stating that:

"I hereby certify every person who signed this sheet did so in my presence and I believe each person is a qualified voter of the state of Oregon."

The circulator shall complete the date when the certification is signed and shall not collect any additional signatures on that sheet after dating the certification.

***Warning:** Violations of the circulator requirements may result in conviction of a felony with a fine of up to $100,000 and/or prison for up to five years.*

Signature and Distribution Requirements (ORS 249.740)

For any office, the number of verified signatures required to place a candidate on the ballot by individual electors is *one percent* of votes cast in the electoral district for which the nomination is intended, for all candidates for presidential

electors at the last presidential election. The number of valid signatures needed for a statewide office is 15,306.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

SANDRA KUCERA, an elector of Oregon and candidate for Vice President of the United States, SARAH THERESE WINDER, KRISTIN ZUBEL, and NATALIE BOLTON, each an elector of Oregon and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice-President of the United States and as a circulator of said nominating petition, PHILLIP SALISBURY and SAMANTHA BERG, each an elector of and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice-President of the United States, TIMOTHY JOHNSON, a circulator of said nominating petition who is not an elector of Oregon, GREGORY KAFOURY, an individual, an elector of Oregon and Co-Chair, Nader for President 2004 in Oregon,

Plaintiffs,

v.

BILL BRADBURY, Secretary of State,

Defendant.

Case No. 04C-18259
Honorable Paul J. Lipscomb

SECOND AFFIDAVIT OF JOHN LINDBACK

STATE OF OREGON)
) ss.
County of Marion)

I, John Lindback, being first duly sworn, depose and say:

1. I am the Director of the Elections Division in the Oregon Secretary of State's office and have served in that capacity for approximately the past three years. My responsibilities as the Director of the Elections Division include overseeing the process to determine whether elections petitions qualify for the ballot.

2. I make this affidavit to summarize, to the extent pertinent, the procedures for verifying the circulator's signature and confirming compliance with the date requirement on candidate petitions in Oregon.

Signature Verification Procedures

3. To qualify a candidate for the ballot, the campaign must submit an adequate number of valid petition signatures. Upon submission of petition sheets, county officials review the sheets to verify, among other things, that each one bears the circulator's signature. In that process, county officials follow procedures established by the Secretary of State, as the chief elections officer of the state. If a sheet does not bear a circulator's signature, it is disqualified. If a sheet bears what appears to be a signature, it is generally accepted without more. If a sheet bears a mark, but the mark is illegible or appears to be initials, county officials identify that sheet for further review by my office. On further review, we seek to confirm that, despite appearances, the mark is the purported circulator's valid signature. In those circumstances, using the printed name under the circulator's signature, we attempt to locate a voter registration card for the circulator. If the signature on the sheet reasonably can be said to match the signature on the card, the signature is accepted; if not, the sheet is dis-

qualified. These aspects of our process are historical and apply to every type of elections petition.

4. Since 1999, nonregistered voters have been eligible to circulate petitions. That creates an additional burden on an already time-constrained process, in that alternative means are now permitted to verify the signatures of nonregistered circulators. This is a narrow exception to the longstanding rule that extraneous proof—beyond the circulator's voter registration and on other petitions in the Secretary's possession—of a circulator's signature generally is not permitted.

5. It is also a longstanding rule that initials may not be used in lieu of a signature. Of course, some people's actual signatures appear similar to initials. If the circulator's signature, as shown on the voter registration card or on another permissible exemplar, confirms that the circulator's signature simply appears like initials, then the signature is accepted. But if the exemplar shows a different signature, then the initialed petition sheet is disqualified.

6. I do not consider myself an expert in handwriting analysis, nor is that considered a requirement for my position. That said, in early 2002 the staff of the Elections Division, including myself, received classroom training from document experts employed by the State Crime Laboratory on issues related to signature verification. In addition, I attended a similar training session by State Crime Laboratory personnel at the 2002 summer conference of the Oregon Association of County Clerks.

7. It bears emphasis that our practice is to accept a purported circulator's signature if there is any reasonable way to do so.

8. The certification requirement and signature verification process do help disclose suspicious signatures and likely fraud. For example, in 2000 Kelly Highley was convicted of signature fraud, after Yamhill County personnel examining

the signatures suspected forgeries on sheets certified by Ms. Highley. Even in the most recent initiative cycle we have observed several potential cases of criminal signature fraud which we are pursuing with the Criminal Justice Division of the Attorney General's Office.

Procedures to Confirm Compliance with the Date Requirement

9. In December 2002, the Secretary of State promulgated amendments to the *2002 Candidates Manual*. Those amendments included the new requirement that the circulator date the certification on each sheet. New petition sheet forms were included with these amendments, adding a field for entry of the date. An excerpt of the pertinent text, as amended—including the updated form—is attached as Exhibit 1 to this affidavit. At that time, the date requirement also was added with respect to other types of elections petitions.

10. Because the date is considered a part of the circulator's certification, failure to properly complete it constitutes a failure to certify the petition sheet. In those circumstances, the defective petition sheet is disqualified.

11. Similarly, in furtherance of the purpose to prevent fraud, the Secretary has interpreted the requirement of a dated signature to disqualify sheets bearing alterations (such as stricken material), but has permitted corrections of a dating error by re-dating and re-signing.

12. In implementing the date requirement, we have encountered numerous scenarios that we had not originally anticipated. Applying the date requirement to each of those scenarios, our guiding principle is to ask whether the face of the sheet tells a clear story of how the sheet was completed and, if so, whether it was completed properly.

13. Where there is no date, obviously the sheet is not completed properly. It is disqualified.

14. Where the sheet is dated before the elector signatures, the sheet itself tells the clear story of how it was completed, but that clear story discloses that the sheet was completed improperly. The circulator cannot properly certify that the elector signatures on the sheet were affixed in the circulator's presence, and that the circulator believes each signor to be an eligible voter, until after the elector signatures have been affixed.

15. Similarly, a "post-dated" certification (a certification bearing a date after submission of the petition sheets to the Secretary of State), on its face, tells a clear story of how it was completed, but it is not completed properly. Where the certification is post-dated, it appears that the circulator seeks to defer responsibility for certification. For our purposes, we require the circulator's present certification. We do, however, treat a post-dated *year* as a simple error and therefore overlook it.

16. Where information is stricken on the date line, and other information has been substituted, the face of the sheet does not tell a clear story demonstrating that it was filled out properly. One possible scenario (the "innocent slip of the pen" scenario) is that the circulator signed it, dated it erroneously, realized the error, struck the error, and redated correctly. But another possibility is that the circulator signed improperly—perhaps before witnessing the elector signatures—conveyed the sheets to another person, and that the other person fraudulently altered the circulator's certification. Because it is impossible to tell that the sheet was completed properly, the sheet is disqualified.

17. On the other hand, where a date has been stricken and another written in, the sheet is accepted if either date would be proper. Also, where the date has been expressed as a range, but it is clear from the face of the sheet that it was dated all at once, the sheet is accepted if the last date in the range would be proper. In addition, where it is apparent that the circulator

has used the "European" format for dating, switching the position of the month and the date, the sheet is accepted if the date is otherwise proper. Finally, if there is an error in the year given by the circulator, and the sheet was not in circulation during the year given, it is treated as a simple error and the sheet is accepted if the date is otherwise proper.

18. These rules were openly applied in November 2003, during the verification process for the referendum that became Measure 30.

19. When initiative petitions submitted for early verification during the current election cycle included substantial numbers of sheets disqualified for noncompliance with the date requirement, I invited all chief petitioners who had received approval to circulate 2004 initiative petitions to a meeting. At that meeting on June 2, 2004, I explained in detail our procedures and interpretations of the date requirement. I also distributed copies of a sheet detailing "acceptable" and "not acceptable" deviations from simple compliance.

20. In early July 2004, a number of supporters of various initiative petitions brought suit in federal court challenging, among other things, the date requirement. The plaintiffs in that case were represented by plaintiffs' counsel in this case, Ms. Meek and Mr. McDougal. Plaintiff Kafoury was present during the proceedings, held during July. As co-chair of the campaign, Mr. Kafoury was on notice at least by that time that compliance with the date requirement is mandatory.

21. Moreover, on July 30, 2004, I (and Brenda Bayes of my office) discussed candidate petition requirements with Travis Diskin of the Nader campaign. Ms. Bayes memorialized that telephone conference with a note to our file. That memo is attached as Exhibit 2 to this affidavit.

22. During that conversation, Mr. Diskin asked about the requirements for the circulator's certification. We explained that the circulator must sign and date the certification. We

specifically explained that the circulator must not use initials. We further explained that if an error is made with the date, the circulator should simply re-sign and re-date the sheet, but should not strike out material. That information is memorialized in paragraph 3 of Ms. Bayes' memo.

DATED this 8th day of September, 2004.

/s/ John Lindback
JOHN LINDBACK

SUBSCRIBED AND SWORN to before me this 8th day of September, 2004.

/s/ Carol J. Watson
Notary Public for Oregon
My Commission Expires: 8/29/2008

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

SANDRA KUCERA, an elector of Oregon and candidate for Vice President of the United States, SARAH THERESE WINDER, KRISTIN ZUBEL, and NATALIE BOLTON, each an elector of Oregon and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice-President of the United States and as a circulator of said nominating petition, PHILLIP SALISBURY and SAMANTHA BERG, each an elector of and signor of a petition for nomination of Ralph Nader for President of the United States and Sandra Kucera as Vice-President of the United States, TIMOTHY JOHNSON, a circulator of said nominating petition who is not an elector of Oregon, GREGORY KAFOURY, an individual, an elector of Oregon and Co-Chair, Nader for President 2004 in Oregon,

Plaintiffs,

v.

BILL BRADBURY, Secretary of State,

Defendant.

Case No. 04C18259

AFFIDAVIT OF JEANNIE BERG

STATE OF OREGON)
) ss.
County of Multnomah)

I, Jeannie Berg, having been first duly sworn, hereby depose and state:

1. I am currently the Election Protection Coordinator for America Coming Together (ACT). In this position, I am responsible for overseeing efforts to ensure that all Oregonians who wish to vote are able to do so and that their votes are counted. Previously, I served as Precinct Program Director for ACT.

* * * * *

CIRCULATOR SIGNATURE AND DATING VERIFICATION

15. The requirement that circulators sign their name legibly is a historical requirement in Oregon and one that serves to prevent fraud. I was aware as early as 1998 that the Secretary of State began rejecting sheets where the signature was illegible or where the circulator only signed initials. In our efforts to improve the integrity of the initiative process, the VEP supported the Secretary of State's strict enforcement of this requirement as a way to improve circulator accountability.

16. The Secretary of State adopted the circulator dating requirement in 2002. I personally recommended to John Lindback that the Secretary adopt this requirement as a means for improving accountability and preventing fraud. We also made other recommendations. I believed that the dating requirement would help hold circulators more accountable based on my experience trying to investigate and prove fraud. At my direction, VEP staff would attempt to contact circulators whose pages contained questionable signatures and were often told, "I did not collect signatures past x date." I can re-

call one specific situation where I reviewed the sponsorship sheets for initiative petition 168 (2002), the term limits measure. It was obvious that a number of signatures were forged on those sheets, because the signatures did not resemble the voter registration card and because individuals told our investigators that they did not sign. At my direction, VEP staff talked with the circulator about the discrepancy. He signed an affidavit stating that he only collected the "good signatures," for example, those appearing on lines 1-15. He said someone else must have forged the signatures after he returned them to the campaign. I provided this affidavit to the elections division along with a complaint alleging fraud. Had this circulator been required to date his signature, it would have been easier to show that he either did or did not submit the forged signatures.

* * * * *

THE SECRETARY'S RULES

29. The problems I experienced in monitoring the Nader signature gathering campaign demonstrates the importance of the prior sequential rule. That rule accomplishes two things. One, it makes the Chief Sponsor accountable for his submissions to the county. This is because only the Chief Sponsor knows how many signatures have been submitted previously. Also, in my experience running campaigns, the act of numbering sheets is the last step in the process and indicates that I am satisfied that the signatures were gathered lawfully and that the sheets comply with the applicable standards. Finally, any provision that requires the Chief Sponsor to exercise control increases accountability and helps deter fraud.

30. The second purpose served by the prior sequential numbering rule is administrative ease and transparency in the process. The process of reviewing the Nader signature sheets is a case in point. Because of the Chief Sponsor's failure to

number sheets and his subsequent alteration of sheet numbers, it has been extremely difficult to identify and track problems.

* * * * *

32. The Secretary's strict enforcement of the circulation verification requirement also serves to deter fraud. In my experience, circulators have been able to deny responsibility for obvious fraud by claiming that they did not collect a signature. Other circulators give inaccurate information about their address, again in order to avoid being held responsible. In my opinion, any rule that strengthens the Secretary's ability to accurately identify the circulator and eliminate circulator excuses deters fraud.

DATED this 7th day of September, 2004

/s/ Jeannie Berg
JEANNIE BERG

SUBSCRIBED AND SWORN to before me this 7th day of September, 2004.

/s/ Laurie Kanouse
Notary Public for Oregon
My Commission Expires: 1/28/2006

18.082 Effect of entry of judgment. (1) Upon entry of a judgment, the judgment:

(a) Becomes the exclusive statement of the court's decision in the case and governs the rights and obligations of the parties that are subject to the judgment;

(b) May be enforced in the manner provided by law;

(c) May be appealed in the manner provided by law;

(d) Acts as official notice of the court's decision; and

(e) May be set aside or modified only by the court rendering the judgment or by another court or tribunal with the same or greater authority than the court rendering the judgment.

(2) A general judgment incorporates a previous written decision of the court that decides one or more claims in the case and that:

(a) Is not a judgment;

(b) Is consistent with the terms of the general judgment and any limited judgments in the case; and

(c) Reflects an express determination by the court that the decision be final as to the claim or claims resolved.

(3) Upon entry of a general judgment, any claim in the action that is not decided by the general judgment or by a previous limited judgment, that has not been incorporated into the general judgment under subsection (2) of this section, or that cannot be decided by a supplemental judgment, is dismissed with prejudice unless the judgment provides that the dismissal is without prejudice.

(4) Subsection (3) of this section does not affect the right of any party to assign error on appeal to any decision of a court made by order during an action.

(5) Subsection (3) of this section does not apply to a general judgment of dismissal. Except as otherwise provided by

law, by the Oregon Rules of Civil Procedure or by the terms of the judgment, a general judgment of dismissal is without prejudice as to any claim or charge in the action.

(6) If a document labeled as a decree is filed with the court administrator, or a judgment document is filed with the court administrator that does not indicate whether the judgment is a limited, general or supplemental judgment, and the court administrator fails to comply with ORS 18.058 and makes an entry in the register indicating that a judgment has been filed with court administrator, the document has the effect of a general judgment entered in circuit court. [2003 c.576 §11]

183.400 Judicial determination of validity of rule. (1) The validity of any rule may be determined upon a petition by any person to the Court of Appeals in the manner provided for review of orders in contested cases. The court shall have jurisdiction to review the validity of the rule whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question, but not when the petitioner is a party to an order or a contested case in which the validity of the rule may be determined by a court.

(2) The validity of any applicable rule may also be determined by a court, upon review of an order in any manner provided by law or pursuant to ORS 183.480 or upon enforcement of such rule or order in the manner provided by law.

(3) Judicial review of a rule shall be limited to an examination of:

(a) The rule under review;

(b) The statutory provisions authorizing the rule; and

(c) Copies of all documents necessary to demonstrate compliance with applicable rulemaking procedures.

(4) The court shall declare the rule invalid only if it finds

that the rule:

(a) Violates constitutional provisions;

(b) Exceeds the statutory authority of the agency; or

(c) Was adopted without compliance with applicable rulemaking procedures.

(5) In the case of disputed allegations of irregularities in procedure which, if proved, would warrant reversal or remand, the Court of Appeals may refer the allegations to a master appointed by the court to take evidence and make findings of fact. The court's review of the master's findings of fact shall be de novo on the evidence.

(6) The court shall not declare a rule invalid solely because it was adopted without compliance with applicable rulemaking procedures after a period of two years after the date the rule was filed in the office of the Secretary of State, if the agency attempted to comply with those procedures and its failure to do so did not substantially prejudice the interests of the parties. [1957 c.717 §6; 1971 c.734 §9; 1975 c.759 §9; 1979 c.593 §17; 1987 c.861 §3]

246.110 Secretary of State as chief elections officer. The Secretary of State is the chief elections officer of this state, and it is the secretary's responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election laws. [1957 c.608 §2; 1979 c.190 §5; 1995 c.607 §1]

246.120 Directives, instructions and assistance to county clerks. In carrying out the responsibility under ORS 246.110, the Secretary of State shall prepare and distribute to each county clerk detailed and comprehensive written directives, and shall assist, advise and instruct each county clerk, on registration of electors and election procedures which are under the direction and control of the county clerk. The directives and instructions shall include relevant sample forms of

ballots, documents, records and other materials and supplies required by the election laws. A county clerk affected thereby shall comply with the directives or instructions. [1957 c.608 §3; 1965 c.464 §1; 1979 c.190 §6]

246.150 Rules. The Secretary of State may adopt rules the secretary considers necessary to facilitate and assist in achieving and maintaining a maximum degree of correctness, impartiality and efficiency in administration of the election laws. [1957 c.608 §8; 1979 c.190 §8; 1985 c.448 §1]

247.005 Policy. It is the policy of this state that all election laws and procedures shall be established and construed to assist the elector in the exercise of the right of franchise. [1969 c.337 §3; 1979 c.190 §40]

249.006 Official dating of petitions and declarations. Immediately upon filing, a nominating petition, declaration of candidacy, withdrawal, certificate of nomination or other document required to be filed under this chapter shall be dated and time stamped by the filing officer. [Formerly 249.130]

249.007 [1985 c.508 §4; repealed by 1995 c.607 §91]

249.008 Verification of signatures by county clerk; removal of signatures prohibited after submittal. (1) Except as provided in subsection (2) of this section, before a nominating petition, minutes of an assembly of electors, or petition by individual electors is offered for filing, the county clerk of each county in which the signatures were secured shall compare the signatures of electors on the petition or minutes with the signatures of the electors on the elector registration cards. Any petition or minutes submitted for verification under this section shall contain only original signatures. The county clerk shall attach to the petition or minutes a certificate stating the number of signatures believed to be genuine. The certificate is prima facie evidence of the facts stated in it. A signature not included in the number certified to be genuine shall not be counted by the officer with whom the petition is filed.

No signature in violation of the provisions of this chapter shall be counted.

(2) If the total number of signatures presented to a county clerk for verification is 15,000 or more, the county clerk may use a statistical sampling technique authorized by the Secretary of State to verify the signatures. The sample shall be drawn from at least 100 percent of the number of signatures required for nomination.

(3) After signatures of electors on a nominating petition, minutes of an assembly of electors or petition by individual electors are submitted for verification, no elector who signed the petition or minutes may remove the signature of the elector from the petition or minutes. [Formerly 249.055; 1985 c.808 §10; 1989 c.68 §2; 1993 c.493 §6]

249.009 Exclusive form of signature sheets for petitions; numbering of signature sheets. (1) The Secretary of State by rule shall:

(a) Design the form of nominating or recall petitions, certificates of nomination by individual electors, minutes of an assembly of electors or minor political party formation petitions; and

(b) Prescribe a system for numbering all signature sheets of nominating or recall petitions, certificates of nomination by individual electors, minutes of an assembly of electors or minor political party formation petitions.

(2) Regardless of any provision to the contrary in a county or city charter or ordinance, for the purpose of nominating city or county candidates, recalling city or county officers or forming a minor political party, an individual must use the applicable form designed under this section. [Formerly 246.180; 1985 c.808 §11; 1989 c.68 §3]

249.712 Acceptance of nomination. (1) To complete a nomination, the nominee must accept the nomination.

(2) The acceptance of the nominee may be indorsed upon the certificate of nomination and signed by the nominee, or it may be indorsed by a letter or telegram from the nominee attached to the certificate and filed with it. If the acceptance does not accompany the certificate of nomination, the nominee, at any time after the certificate is filed and before the time for filing nominations for the office has expired, may file an acceptance in the same manner and in the same office where the certificate is filed. The officer with whom the acceptance is filed shall indorse it and attach it to the certificate of nomination to which it refers. [Formerly 249.760]

249.715 [1977 c.324 §2; 1979 c.190 §130; renumbered 249.735]

249.720 Information to be contained in certificate of nomination. (1) A certificate of nomination shall state:

(a) The name by which the candidate is commonly known. A candidate may use a nickname in parentheses in connection with the full name.

(b) Address information as required by the Secretary of State by rule.

(c) The office, and department or position number if any, for which the candidate is nominated.

(d) The name of the minor political party, if any, which nominated the candidate.

(e) If the candidate is nominated for a partisan office by an assembly of electors or individual electors, the word "independent" and a statement that the candidate has not been a member of a major or minor political party during at least 180 days before the deadline for filing the certificate of nomination.

(2) For certificates of nomination of candidates for electors of President and Vice President of the United States, the

names of the candidates for President and Vice President the candidates represent may be added to the name of the minor political party or the word "independent," as the case may be. The names of all the candidates of a minor political party, or independent candidates, for electors of President and Vice President may be upon the same certificate of nomination.

(3) A certificate of nomination made by an assembly of electors shall be signed by the presiding officer and secretary of the nominating convention of the assembly. A certificate of nomination made by a minor political party shall be signed by an officer of the party. An affidavit shall be made on the certificate by the presiding officer and secretary of the nominating convention of the assembly or by the officer of the minor political party and signed and acknowledged by them before a notary public. The affidavit shall be that the statements in the certificate of nomination and related documents are true. With respect to an assembly of electors, the affidavit shall state that the assembly satisfied the requirements of ORS 249.735. [Amended by 1957 c.608 §110; 1961 c.336 §3; 1973 c.841 §2; 1975 c. 678 §24; 1979 c.190 §127; 1981 c.142 §1; 1991 c.719 §8; 1993 c.797 §13; 1995 c.607 §19]

249.722 Time for filing certificate; filing officers. (1) Except as provided in subsection (3) of this section, a certificate of nomination of a candidate for public office shall be filed not sooner than the 415th day and not later than the 70th day before the date of the general election.

(2) A certificate of nomination of a candidate for:

(a) State office, United States Senator or Representative in Congress shall be filed with the Secretary of State.

(b) County office shall be filed with the county clerk.

(c) City office shall be filed with the chief city elections officer.

(3) For a special election, including an election to fill a

vacancy that occurs after the 70th day before the general election, the Secretary of State by rule may adopt a schedule specifying the period within which a certificate of nomination must be filed. If the Secretary of State does not adopt a rule under this subsection, a certificate of nomination must be filed before the 61st day preceding the election. [1979 c.190 §128; 1987 c.267 §23; 1993 c.493 §§8,9; 1995 c.607 §20; 1995 c.712 §32; 1999 c.999 §39; 2001 c.145 §2]

249.730 [Amended by 1957 c.608 §111; 1963 c.176 §2; 1977 c.324 §3; repealed by 1979 c.190 §431]

249.732 [1979 c.190 §129; 1983 c.756 §6; 1989 c.923 §28; repealed by 1993 c.493 §113 and 1993 c.797 §33]

(Nomination by Assembly of Electors)

249.735 Qualification as assembly of electors; records; notice; nomination by assembly. (1) An assembly of electors is an organized body:

(a) Of not fewer than 1,000 electors of the state for a statewide nomination.

(b) Of not fewer than 500 electors of the congressional district for which the nomination for Representative in Congress is made.

(c) Of not fewer than 250 electors of the county or any other district for which the nomination is made.

(2) An assembly of electors shall nominate candidates at a nominating convention. The convention shall be held in one day and last not longer than 12 hours. The signature, printed name and residence mailing address of each member of the assembly shall be recorded at the convention and entered of record in the minutes by the secretary of the assembly. Not less than the minimum number of electors required to constitute an assembly of electors shall have recorded their signatures in the minutes of the assembly and must be present

when the assembly nominates a candidate. The candidate receiving the highest number of votes of the assembly for the office shall be the nominee of the assembly.

(3) Not later than the 10th day before the meeting of an assembly of electors, notice shall be published at least once in not less than three newspapers of general circulation within the electoral district for which the nomination will be made. The notice shall contain the time and place the assembly will meet, the office or offices for which nominations will be made, and the names and addresses of not fewer than 25 electors qualified to vote in the assembly who desire that it be held.

(4) Proof of publication of notice in subsection (3) of this section shall be made by affidavit of the owner, editor, publisher, manager, advertising manager, principal clerk of any of them, or the printer or printer's foreman of the newspaper in which the notice is published. The affidavit shall show publication and shall be filed with the filing officer with the certificate of nomination.

(5) Not later than the 10th day before the meeting of an assembly of electors, a copy of the notice under subsection (3) of this section shall be delivered to the filing officer who will supervise the conduct of the nominating convention.

(6) The presiding officer of an assembly of electors shall deliver the signatures of assembly members entered in the minutes to the appropriate county clerks of the counties in which the assembly members live. The signatures shall be certified by the appropriate county clerk under ORS 249.008. A copy of the minutes, certified by the secretary of the assembly, and the certificate of the county clerk shall be filed with the filing officer with the certificate of nomination.

(7) If the assembly of electors designates a committee to whom the assembly delegated the authority to fill vacancies as provided in ORS 249.842, a notice containing the names of

the members of the committee shall be delivered to the filing officer with the certificate of nomination. [Formerly 249.715; 1983 c.514 §7; 1983 c.567 §9; 1985 c.808 §18; 1993 c.797 §14]

249.737 Filing officer for nomination by assembly of electors. (1) The filing officer for the office for which nominations will be considered by an assembly of electors shall supervise the conduct of the nominating convention. The filing officer shall insure that when the assembly of electors makes a nomination, the number of electors required to be present at the nominating convention for the purpose of constituting an assembly is at least equal to each of the following:

(a) The number of signatures of assembly members in the minutes of the assembly.

(b) The number of electors present at the nominating convention.

(2) If an assembly of electors will consider nominations for an office for which the Secretary of State is the filing officer and an office for which the county clerk or chief city elections officer is the filing officer, the Secretary of State shall be the supervising officer under subsection (1) of this section.

(3) If an assembly of electors will consider nominations for an office for which the county clerk is the filing officer and an office for which the chief city elections officer is the filing officer, the county clerk shall be the supervising officer under subsection (1) of this section. [1983 c.567 §11]

(Nomination by Individual Electors)

249.740 Certificates of nomination made by individual electors; statement regarding payment of petition circulators; certification of signature sheets. (1) A certificate of nomination made by individual electors shall contain a number of signatures of electors in the electoral district equal to not less than one percent of the total votes cast in the electoral

district for which the nomination is intended to be made, for all candidates for presidential electors at the last general election.

(2) Each elector signing a certificate of nomination made by individual electors shall include the residence mailing address of the elector. Except for a certificate of nomination of candidates for electors of President and Vice President of the United States, a certificate of nomination made by individual electors shall contain the name of only one candidate.

(3) Before beginning to circulate the certificate of nomination, the chief sponsor of the certificate shall file a signed copy of the prospective certificate with the filing officer referred to in ORS 249.722. The chief sponsor of the certificate shall include with the prospective certificate a statement declaring whether one or more persons will be paid money or other valuable consideration for obtaining signatures of electors on the certificate. After the prospective certificate is filed, the chief sponsor shall notify the filing officer not later than the 10th day after the chief sponsor first has knowledge or should have had knowledge that:

(a) Any person is being paid for obtaining signatures, when the statement included with the prospective certificate declared that no such person would be paid.

(b) No person is being paid for obtaining signatures, when the statement included with the prospective certificate declared that one or more such persons would be paid.

(4) The circulator shall certify on each signature sheet that the individuals signed the sheet in the presence of the circulator and that the circulator believes each individual is an elector registered in the electoral district.

(5) The signatures contained in each certificate of nomination made by individual electors shall be certified for genuineness by the county clerk under ORS 249.008.

(6) As used in this section, "prospective certificate" means the information, except signatures and other identification of certificate signers, required to be contained in a completed certificate of nomination. [Amended by 1955 c.169 §5; 1957 c.608 §112; 1971 c.152 §1; 1977 c.829 §10; 1979 c.190 §131; 1983 c.756 §7; 1993 c.493 §11; 1993 c.797 §15; 1999 c.318 §25]

249.750 [Amended by 1957 c.608 §113; 1979 c.190 §100; renumbered 249.013]

249.760 [Amended by 1979 c.190 §126; renumbered 249.712]

249.770 [Amended by 1957 c.608 §114; 1971 c.749 §79; 1977 c.324 §4; repealed by 1979 c.190 §431]

249.780 [Amended by 1957 c.608 §115; 1961 c.49 §2; 1971 c.749 §80; 1977 c.324 §5; repealed by 1979 c.190 §431]

249.790 [Amended by 1977 c.829 §11; repealed by 1979 c.190 §431]

(Register of Nominations)

249.810 Entries in register of nominations upon filing certificates. (1) Immediately after each certificate of nomination is filed, the filing officer shall enter in the register of nominations:

(a) The date the certificate was filed.

(b) The name of each candidate.

(c) The office for which the candidate is nominated.

(d) When applicable, the name of the minor political party or identification of the assembly of electors making the nomination, and the names of the chairperson and secretary certifying it.

(e) If the certificate of nomination is made by individual electors, the total number of certified signatures contained in

the certificate.

(2) As soon as an acceptance or withdrawal of a candidate is filed with a filing officer, it shall be entered in the register of nominations. [Amended by 1957 c.608 §116; 1979 c.190 §132]

249.820 [Repealed by 1979 c.190 §431]

(Withdrawals; Filling Vacancies)

249.830 Procedure for withdrawing nomination. Any person who has been nominated and has accepted the nomination under ORS 249.712 may withdraw from nomination not later than the 67th day before the general election by filing with the officer with whom the certificate of nomination was filed a written statement declining the nomination and stating the reason for withdrawal. The statement shall be signed and acknowledged by the candidate before a notary public. The withdrawal may be sent to the Secretary of State through a county clerk, as provided by ORS 249.850. [Amended by 1957 c.608 §117; 1967 c.86 §1; 1979 c.190 §133]

249.840 [Amended by 1957 c.608 §118; repealed by 1979 c.190 §431]

249.842 Filling vacancy in nomination. (1) Subject to subsection (5) of this section, before the date of the general election, a vacancy in a nomination made by a minor political party may be filled as provided by party rule.

(2) Subject to subsection (5) of this section, before the date of the general election, a vacancy in a nomination made by an assembly of electors may be filled by:

(a) Reconvening the assembly that made the original nomination to select a new nominee; or

(b) A committee to whom the assembly at its convention delegated the authority to fill vacancies.

(3) An assembly of electors may reconvene under subsec-

tion (2) of this section only at the call of the chairperson of the original assembly. An assembly will be considered the assembly that made the original nomination if the chairperson and secretary are the same as those of the original assembly.

(4) Subject to subsection (5) of this section, before the date of the general election, a vacancy in a nomination made by individual electors may be filled by filing a new certificate of nomination. The certificate of nomination to fill the vacancy shall conform with the requirements of ORS 249.720 and 249.740.

(5) The Secretary of State by rule may adopt a schedule specifying the period after a vacancy in a nomination occurs within which a certificate of nomination filling the vacancy must be filed. [1979 c.190 §134; 1985 c.808 §19; 1993 c.797 §16]

249.850 Filing of certificate to fill vacancy in nomination; notifying proper officials to make changes in general election ballots. (1) The certificate of nomination to fill the vacancy under ORS 249.842, may be filed directly with the officer with whom the certificate of nomination of the original candidate was filed, or it may be presented in duplicate to any county clerk who shall file one of the certificates in the clerk's office, immediately notify the appropriate filing officer of the nomination and send the duplicate certificate to the officer by the most expeditious method practicable.

(2) Upon receipt of notification that a vacancy has been filled, the filing officer shall certify the name of the person selected to fill the vacancy to be included on the ballot. If the certification of candidates has already been sent to the county clerk, the Secretary of State or city filing officer immediately shall give written certification of the new candidate to each county clerk responsible for preparing ballots on which the office will appear. The certification shall state the name and residence of the candidate nominated to fill the vacancy, the

office for which the nomination was made, the name of the minor political party the candidate represents or the name of the chairperson of the assembly nominating the candidate, and the name of the person for whom the candidate is substituted. Upon receipt of the certification, the county clerk shall place the new candidate's name on the ballot. [Amended by 1957 c.608 §119; 1975 c.675 §19; 1979 c.190 §135]

165-010-0005

Designating the State Candidates Manuals, County Candidate's Manual and Forms

(1) The Secretary of State designates the *2004 State Candidate's Manual: Major Political Party* and associated forms as the procedures and forms to be used by major political party candidates filing and running for state elective office.

(2) The Secretary of State designates the *2004 State Candidate's Manual: Nonpartisan* and associated forms as the procedures and forms to be used by nonpartisan candidates filing and running for state elective office.

(3) The Secretary of State designates the *2004 State Candidate's Manual: Minor Political Party* and associated forms as the procedures and forms to be used to form a Minor Political Party and by minor political party candidates filing and running for state elective office.

(4) The Secretary of State designates the *2004 State Candidate's Manual: Assembly of Electors* and associated forms as the procedures and forms to be used by nonaffiliated candidates filing and running by assembly of electors for state elective office.

(5) The Secretary of State designates the *2004 State Candidate's Manual: Individual Electors* and associated forms as the procedures and forms to be used by nonaffiliated candidates filing and running by individual electors for state elective office.

(6) The Secretary of State designates the *2004 County Candidate's Manual* and associated forms as the procedures and forms to be used by county office candidates and precinct committeeperson candidates filing and running for elective office.

Secretary of StateCertificate and Order for Filing

PERMANENT ADMINISTRATIVE RULES

I certify that the attached copies are true, full and correct copies of the **PERMANENT** Rule adopted on April 8, 2005 by the

Secretary of State, Elections Division — Chapter 16

Brenda Bayes — (503) 986-1518

141 State Capitol, Salem, OR 97310-0722

to become effective upon filing. Rulemaking Notice was published in the January 1, 2005 Oregon Bulletin

RULEMAKING ACTION

ADOPT: 165-014-0270

AMEND:

REPEAL:

Stat Auth: ORS 246.150, 249.008, 250.105, 250.215, 250.315, 255.175

Other Authority

Stats. Implemented: ORS 249.008, 249.061, 249.740, 249.865, 249.875, 250.045, 250.105, 250.215, 250.315, & 255.175

RULE SUMMARY

This proposed rule adopts specific standards for what constitutes a sufficient circulator's certification on Initiative, Referendum, Recall, and Candidate Nominating petitions. These standards are based on current office policy, and based on direction from the U.S. District Court, are being incorporated into administrative rule.

/s/ Brenda Bayes

Brenda Bayes

165-014-0270

Circulator Certification

(1) The purpose of this rule is to incorporate into administrative law previously enforced standards on what constitutes a sufficient circulator certification on Initiative, Referendum, Recall, and Candidate Nominating petitions.

(2) A petition signature sheet will be rejected for insufficient circulator certification if:

(a) No signature whatsoever appears below the certification;

(b) No date appears next to circulator's signature or the date is crossed out;

(c) The date of the circulator certification is earlier than the date of the electors' signatures, unless the circulator and the only signer are the same person;

(d) Original date is crossed out, and a new date is provided, but the circulator failed to re-sign;

(e) Any part of the original date is overwritten with a different date;

(f) Date information is insufficient or ambiguous. Date must be provided in month, day, year order if written in all numeric characters;

(g) The original signature of a circulator has been crossed out, and a different circulator's signature is inserted;

(h) Two individuals sign and date as circulator, unless the only signers and the circulators are the same people;

(i) White out appears on the signature or date line;

(j) The circulator has signed using only initials, unless the circulator's use of initials as a signature is verified by exemplar under paragraph (5) of this rule;

(k) The circulator has signed using a signature stamp, unless use of a signature stamp has been approved under ORS 246.025;

(l) Circulator's signature is photocopied, carbon-copied, or otherwise appears on the face of the document to be a replicated and not original signature except as provided for in ORS 250.043;

(m) Signature, printed name, and address are all illegible;

(n) Signature alone is illegible, unless the circulator's use of the apparently illegible signature is verified by exemplar under paragraph (5) of this rule;

(o) Circulator's signature is in printed script rather than cursive script, unless the circulator's use of a printed signature is verified by exemplar under paragraph (5) of this rule;

(p) If for any other reason, from the face of the signature sheet, the circulator's identity cannot be determined or it otherwise cannot be determined that the circulator executed the certification after witnessing the electors' signatures.

(3) If a petition signature sheet contains elector signatures dated both on or before the date of the circulator's effective certification and after the date of the circulator's effective certification, the signature sheet will be accepted with regard to the elector signatures dated on or before the date of the certification, but elector signatures dated after the date of the certification will not be accepted.

(4) The following defects in the circulator certification will *not* result in rejection of the signature sheet:

(a) The circulator's signature appears on the printed name line instead of on the signature line;

(b) Signature consists of full last name and at least the first name initial;

(c) The circulator has signed and dated the certification, but has not provided an address or printed name; or

(d) The circulator has re-signed and re-dated the certification and the circulator's original signature has *not* been crossed out.

(5) If a preliminary determination is made under paragraph (2)(j), (n) or (o) of this rule that a certification is insufficient, the certification signature may be verified by exemplar in the following manner:

(a) The Elections Division will first compare the certification signature to the circulator's current Oregon voter registration card signature, if available. If the certification signature matches the voter registration signature, the petition signature sheet will be accepted. If the certification signature does not match the voter registration signature, the petition signature sheet will be rejected for insufficient certification.

(b) If an Oregon voter registration card bearing the circulator's signature is not available as an exemplar, the Elections Division will compare the certification signature to an alternative exemplar filed with the Elections Division or retained on file by the Elections Division under section (6) of this rule. If the certification signature does not match the alternative exemplar provided or retained under section (6) and (7) of this rule, the petition signature sheet will be rejected for insufficient certification.

(c) If an Oregon voter registration card bearing the circulator's signature is not available as an exemplar, and an alternative exemplar has not been filed with or retained on file by the Elections Division under section (6) and (7) of this rule, the Elections Division will notify the chief petitioner or the chief petitioner's designee by telephone and electronic mail, if available, and provide the chief petitioner or designee an opportunity to submit an alternative exemplar of the circulator's signature.

(A) If an alternative exemplar is requested by the Elections Division not later than the 20th day after signatures are submitted for verification, the chief petitioners or the chief petitioner's designee must provide the alternative exemplar within 2 days of notification for the alternative exemplar to be considered.

(B) If an alternative exemplar is requested by the Elections Division after the 20th day after signatures are submitted for verification, the chief petitioners or the chief petitioner's designee must provide the alternative exemplar within 1 day of notification for the alternative exemplar to be considered.

(C) The alternative exemplar must be a signature on an official government-issued document such as a driver's license or passport, and must have been executed before the date of the attempted certification of the petition signature sheet. If the certification signature matches the alternative exemplar, the petition signature sheet will be accepted. If the certification signature does not match the alternative exemplar, the petition signature sheet will be rejected for insufficient certification.

(D) The alternative exemplar may be physically delivered to the Elections Division or may be delivered by facsimile transmission or electronic mail. If delivered by electronic mail, the document must be reproduced in .gif or .pdf format. The alternative exemplar must be received at the office of the Secretary of State not later than 5 p.m. of the day it is due.

(6) Chief petitioners may submit alternative exemplars of petition circulators' signatures at the same time they submit petition signature sheets for signature verification. The alternative exemplar must comply with the requirements of paragraph (5)(c)(C) of this rule. When submitting alternative exemplars, chief petitioners must provide a list of circulators for whom they are submitting alternative exemplars. If no list accompanies the alternative exemplars submitted under this section, those alternative exemplars will not be accepted or used

to compare the circulator's signature to the certification. If an alternative exemplar is omitted from the list, that alternative exemplar will not be accepted or used to compare the circulator's signature to the certification. Chief petitioners may still be offered the opportunity to submit alternative exemplars under paragraph (5)(c).

(7) Alternative exemplars received and accepted by the Elections Division under paragraphs (5) and (6) of this rule, will be retained on file for two years from the date of receipt.

Stat. Auth.: ORS 246.150, 249.008, 250.105, 250.215, 250.315, 255.175 Stats. Implemented: ORS 249.008, 249.061, 249.740, 249.865, 249.875, 250.045, 250.105, 250.215, 250.315, & 255.175

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In The Supreme Court of the United States

SANDRA KUCERA, SARAH THERESE WINDER, KRISTIN ZUBEL, NATALIE BOLTON, PHILLIP SALISBURY, SAMANTHA BERG, TIMOTHY JOHNSON and GREGORY KAFOURY,

Petitioners,

v.

BILL BRADBURY, Secretary of State, DEMOCRATIC PARTY OF OREGON, JOHN NEEL PENDER and JAMES EDMUNSON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Oregon

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I. RESPONDENT DEPENDS HEAVILY ON TESTIMONY OF AN EMPLOYEE FOUND TO BE INCONSISTENT BY THE TRIAL COURT.

Respondent Bill Bradbury's Brief in Opposition [hereinafter "Respondent"], pp. 1-5, consists largely of quotations and paraphrases of the Second Affidavit of John Lindback, an employee of Respondent. This affidavit was submitted within minutes before trial commenced. The trial court (App. 38-39) found that this affidavit was inconsistent with his testimony at trial:

> No written rule, however, justifies these additional requirements, although Mr. Lindback asserts that this reflects his office's longstanding historical practice.
>
> Mr. Lindback's testimony at the hearing was not entirely consistent with his Second Affidavit submitted in this case. . . .
>
> These unwritten rules, however longstanding, are not supported by the written administrative rules as set forth in the Manual, and they are inconsistent with ORS 247.005, as well as with the prior policy of the Elections Division as set forth above. Additionally, it was obvious from the testimony of Mr. Lindback that the Secretary's unwritten rules were not applied either uniformly or consistently in actual practice.

II. RESPONDENT'S BRIEF OFFERS SEVERAL INTERNAL CONTRADICTIONS AND FACTUAL ERRORS.

Respondent (p. 5) states: "The instructions directed the counties to screen and reject signature sheets that had circulator signature and date problems." But he also states (p. 4):

> Notably, the matter examined by county officials is extremely limited: They simply compare the signatures of electors on the petition or minutes with the signatures of the electors on the elector registration cards.

Thus, Respondent states that the county officials review the sheets for "circulator signature and date problems" but then also states that the counties review only the elector (voter) signatures **only**. Both statements cannot be true. Respondent's defense depends upon maintaining these mutually exclusive statements.

Lindback's statements about accepting exemplars (p. 2), when in fact he didn't, were partly why the trial court found his testimony to be inconsistent. He was contradicted by the uncontested affidavits showing that he disqualified at least 457 verified voter signatures on sheets signed by the named circulators, only because their signatures "appeared to be initials," even though all of them submitted sworn affidavits showing that what "appeared to be initials" were in fact their normal signatures on important documents, such as drivers licenses and Social Security cards. SER 22, 373, 375, 395; Reply of Applications on Application for Stay of Oregon Supreme Court Order Pending Certiorari Review (Sept. 27, 2004), No. 04A242, p. 8. Nader was declared short by 218 signatures.

Respondent (p. 3) states he "has permitted corrections of a dating error by re-dating and re-signing" and (p. 4) that "when a date has been stricken and another written in, the sheet is accepted if their date would be proper." But Respondent (p. 7) states (in the "Unpublished Instructions") that sheets are to be disqualified if "Circulator date has been crossed out or modified." Again, both statements cannot be true. Either a modification to the circulator date disqualifies the sheet or it does not.

III. THE RECORD CLEARLY SHOWS THAT THE NADER CAMPAIGN HAD NO KNOWLEDGE OF THE UNWRITTEN RULES UNTIL THE PETITIONING EFFORT WAS NEAR ITS END.

Respondent (p. 7) claims, "The parties disputed whether petitioners were aware of the Secretary's rules and requirements," referring to the "Unpublished Instructions" Lindback sent to the counties. Respondent cites the Lindback Affidavit (Supp. App. 4), but Lindback states no time at which the

Nader campaign obtained the "Unpublished Instructions." He merely refers to the Affidavit of Travis Diskin, an employee of the Nader campaign. The Diskin Affidavit shows he obtained the "Unpublished Instructions" long after the bulk of the signatures had already been collected in a manner deemed defective by the "unwritten rules."

Diskin testified that he found out during the campaign that the counties had received a "new directive . . . requiring them to pull certain signature sheets from the submitted sheets before verifying elector signatures attached hereto as Exhibit A." SER-29 (attaching the "Unpublished Instructions" also at App 19). This created "gaps" in the required sequential numbering for the sheets. He phoned the responsible employee of Respondent to find out what to do. His contemporaneous handwritten notes (SER-32) state that this call was on August 10, 2004 (a date confirmed by his handwritten notes on the "Unpublished Instructions," SER-33). As the final deadline was August 24, this was late into the petitioning process.

As indicated by Lindback (Supp. App. 6), he disqualified 2,292 signatures "solely for the reason that they were submitted unnumbered to the counties." Nowhere in the record does Respondent contest Diskin's statement that the submittal of unnumbered sheets commenced after his August 10 phone conversation. The record is that Nader submitted some 27,000 signatures to the counties and that Respondent accepted 15,088 of those signatures, while rejecting 718 for circulator "defects" and at least 2,292 for lack of sequential sheet numbering. Supp. App. 6-7. So the number of county-verified voter signatures filed with Respondent was at least 18,098. That means that the ones on the unnumbered sheets constituted at most only 13% of the signatures. That also shows that the switch to unnumbered sheets occurred very late in the campaign, after at least 87% of the signatures had been collected on numbered sheets. And there was no testimony that Respondent ever provided the "Unpublished Instructions" to anyone connected with the Nader campaign.

Respondent (p. 8) claims that Lindback met with Diskin on July 30, 2004, prior to writing the August 4 "Unpublished

Instructions." The only record of what he told Diskin is a "memo to file" by one of his assistants. When Diskin showed his contemporaneous notes of a conversation with a different assistant to Lindback (SER-32), however, the Oregon courts found that an insufficient basis for avoiding application of the agency's written rules on sequential numbering. App. 30. Yet, Respondent offers the proposition that he could create new, unwritten rules, as long as he claimed that one of his employees had a conversation about them (without ever providing them in writing) with one person connected with the Nader campaign. Again, Respondent's positions are inconsistent. Under either proposition, Nader would have qualified for the ballot. Either his campaign was entitled to the 2,354 signatures disqualified for lack of campaign-applied sequential numbers, or it was entitled to the 718 signatures disqualified pursuant to the "unwritten rules."

Respondent (p. 9) states that the trial court made no "express or implicit finding as to whether petitioners had received notice of the challenged rules and procedures before they submitted their signature sheets." To the contrary, the trial court stated that the Secretary was proceeding under "unwritten rules . . . not supported by the written administrative rules as set forth in the Manual" and "not applied either uniformly or consistently in actual practice." How could the Nader campaign have received notice that Respondent would inconsistently apply unwritten rules?

IV. RESPONDENT APPLIED UNWRITTEN RULES TO DISQUALIFY THE NADER PETITION SHEETS.

As shown in our Petition (p. 16), the unwritten rules applied by Lindback included rules (such as that the circulator's signature itself must be "legible") that were not even in the "Unpublished Instructions" and were written nowhere. The Oregon Supreme Court (App. 21) concluded:

> It is true that the review procedures that Lindback described were not themselves written, but that does not render them unlawful.

As the trial court found, there were no **written rules** telling petitioners that circulator signatures must be "legible" and must not "appear to be initials." App. 38. There were

no written rules (apart from the "Unpublished Instructions") banning slips of the pen or other corrections to dates on circulator signatures. Yet, Respondent discarded 718 signatures because of these unwritten rules, with an untold additional number of voter signatures discarded at the county level at Respondent's direction that the counties would also apply the "unwritten rules."

Respondent (p. 13) incorrectly states that the Oregon Supreme Court "specifically rejected the trial court's theories that the signature and date review procedures that the Elections Director had followed in his office were unwritten rules." In fact, that Court expressly stated that the rules "were not themselves written, but that does not render them unlawful." App. 21. That Court never stated that the rules were written or were in any way provided to the petitioners prior to the collection of signatures. The Oregon Supreme Court referred to the "unwritten rules" as "review procedures," but it is clear that they were substantive requirements imposed upon the signature sheets.

Respondent (p. 14) claims that he "plausibly could interpret the requirement of a signature to mean that the circulator must sign his name in full, rather than simply use initials, and so instruct the county clerks." This sweeping assertion evokes that of the Chicago Board of Election Commissioners in *Briscoe v. Kusper*, 435 F.2d 1046, 1052-54 (7th Cir. 1970), which rejected as a violation of due process the Board's requirement that a "proper" signature must include a full legal name with middle initial.

Respondent (pp. 16, 25) offers another contradiction in noting the Oregon Supreme Court's conclusion that the Nader campaign had to follow the written rules pertaining to sequential numbering of signature sheets when submitted to the counties, despite having received oral instructions to the contrary from the appropriate employee in the Secretary of State's office. On that issue, Respondent argues that only the written rules can apply and cannot be modified by unwritten instructions from his employees. Yet, when it comes to the sheets disqualified for alleged problems with circulator signatures or dates, Respondent argues that the written

rules can be changed and supplanted by "Unpublished Instructions" sent to the counties and by completely unwritten rules, such as the "legibility" rule.

V. THIS CASE IS NOT MOOT.

Assertions of rights under the U.S. Constitution in election law cases are often litigated, despite the passing of the election, under the doctrine of "capable of repetition yet evading review." *Norman v. Reed*, 502 U.S. 279, 287-88, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992); cases cited at Petition, p. 4. Respondent claims that Petitioners are "now" "aware of the Secretary's interpretation of elections law rules in the last presidential election." That is not a recognized basis for mootness. If it were, then this Court could never hear an election law case (or perhaps any case), because Petitioners will always be aware of the State's interpretations some months after they are applied, to Petitioners' prejudice.

That Respondent in April 2005 adopted rules pertaining to evaluation of circulator signatures and dates is irrelevant. Petitioners' claims focus on Respondent's application of unwritten rules to disqualify their signature sheets. **Respondent has never disavowed its claimed authority to disqualify such sheets for alleged "defects" that are nowhere mentioned in his published rules.** The Oregon Supreme Court expressly upheld his authority to impose such "unwritten rules" under Oregon law, which makes such imposition capable of repetition. Future independent candidates, petitioners, and circulators will know the new **written** rules but will not know whatever new "unwritten rules" the Secretary may devise. It is his authority to impose, retroactively, such "unwritten rules" that is our central complaint and risk to our rights under the U.S. Constitution.

Respondent's affidavits show his pattern of imposing unwritten rules upon petitioners. Respondent retroactively imposed unwritten rules also on initiative petitions, Supp. App. 30, which gave rise to *Sajo v. Bradbury*, No. 04-36034 (9th Cir.), which is in briefing now with a different set of facts and a different set of written rules. Respondent there argues that his application of unwritten rules to initiative campaigns earlier in 2004 is also moot.

Respondent is claiming some sort of "voluntary cessation" mootness.

> A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice, unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."

Buckhannon Bd. & Care Home v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 609, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001) (quoting *Friends of Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). A "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again *lies with the party asserting mootness.*" *Adarand Const., Inc. v. Slater*, 528 U.S. 216, 222, 120 S.Ct. 722, 145 L.Ed.2d 650 (2000). "Courts are not compelled to leave '[t]he defendant . . . free to return to his old ways.'" *Friends of Earth, supra*; (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, n.10, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982)). In order to overcome the presumption against mootness, defendant must "satisfy the heavy burden of persuasion" that it will not resume the complained-of conduct. *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). Adoption of new rules to partly codify the "unwritten rules" does not cause existing claims to be moot. *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 661-662, 113 S.Ct. 2297, 2301 (1993).[1]

---

[1] If it matters, Respondent's new written rules are not at all the same as the "Unpublished Instructions" he sent to county officials in August 2004 or the same as the additional "unwritten rules" he applied to the Nader sheets. Compare App. 18-19 with Supp. App. 52-57. New rules (2)(c), (2)(d), (2)(e), (2)(f), (2)(h), (2)(j), (2)(k), (2)(m), (2)(n), (2)(o), (2)(p), (4)(d), (5)(c), (6), and (7) are quite different. The new rules (Supp. App. 52) state they are "based on current office policy, and based on direction from the U.S. District Court." This refers to *Sajo v. Bradbury*, No. CV 04 853 PA (9th Cir. No.

(Continued on following page)

Respondent contends that his actions have not "evaded review," because this Court denied our Application for Stay, Pending Certiorari Review (September 24, 2004). A denial of a stay is not adjudication on the merits. Respondent at that time swore it was too late to reprint the ballots. Thus, his actions evaded review due to the schedule of the election.

VI. STATE IMPAIRMENT OF THE EXERCISE OF FRANCHISE RIGHTS REQUIRES A SHOWING THAT IT ACHIEVES AT LEAST AN IMPORTANT STATE INTEREST.

Respondent (p. 25) argues for weaker scrutiny "applicable to reasonable and nondiscriminatory procedural election regulations such as the ones at issue here." The unwritten rules at issue here were substantive, not procedural. They disqualified thousands of verified voter signatures for failure of the sheets to comply with substantive, albeit unwritten or undisclosed, requirements. Second, Respondent identified no reason that his unwritten or undisclosed rules were necessary "to operate elections fairly and efficiently." They fail any standard of scrutiny.

Respondent (p. 26) notes that strict scrutiny applies "where the content of the regulation itself places a 'severe restriction' on ballot access." This criterion is satisfied here, where the unwritten, undisclosed yet substantive rules applied by Respondent disqualified about half of the voter signatures collected in Oregon and certainly caused his absence from the ballot. Allowing a regime of unwritten and/or undisclosed rules, in the hands of an officeholder himself elected on a partisan basis, is tantamount to destruction of ballot access for independent candidates who might draw votes from the candidate of the Secretary of State's party.

04-36034). Plaintiffs lost that case in the District Court, and the District Court did not order Respondent to take any action.

Respondent refers to "discouraging fraud in the execution of signature sheets" but does not identify what fraud this policy somehow discourages. In Oregon, there are no qualifications for performing the task of petition circulator, other than being a human. How does requiring a "legible" signature, regardless of the presence of a legible printed name of the circulator on the next line down, in any way discourage fraud? What is the type of fraud it discourages?

Lindback's attempt (Respondent, p. 28) to justify the sequential numbering requirement makes no sense. The counties find duplicate signatures by notations in their voter registration databases, not by anything related to numbering of the sheets. And here the counties accepted the sheets without numbering, verified the voter signatures, and applied their own numbers before returning them to the campaign. It was Respondent who rejected them, after the counties had already verified 2,357 signatures on those sheets, without objection.

Lindback refers to "the possibility of fraud which may occur by tampering with the sheets after county verification." But his system does not at all prevent that. First, there appears to be no reason at all for the counties to give the signature sheets back to the petitioners instead of simply forwarding them to the Secretary of State. Second, because of Respondent's instructions to the counties to remove hundreds of sheets from the process for alleged defects in circulator signatures and/or dates, the sheets to be submitted by petitioners to the Secretary of State are not in sequence anyway. Respondent admits that the sequential numbering requirement applies to the sheets as they are submitted to the counties, not as they are submitted to Respondent.

Respondent offers the discussion from Jeannie Berg (Supp. App. 6-7) from an affidavit we believe was not part of the record below.[2] Her comments are circular or simply

[2] The motion to intervene by SEIU was not granted and the Berg affidavit therein proffered was not accepted by the trial court.

seek to justify the requirement that the circulator signature be dated. No one is challenging that requirement. We are challenging Respondent's practice of disqualifying sheets if that date was in any way corrected or other than a one-time, pristine flow of ink on paper. She also posits impossible scenarios about inter-campaign "discrediting." Lindback's reference to Kelly Highley has nothing to do with any of the requirements we are challenging.

VII. PETITIONERS' EQUAL PROTECTION CLAIMS WERE FULLY PRESENTED AND PRESERVED BELOW.

The Fifth Claim for Relief in our original filing (designated an "appeal" from agency action by Respondent) with the trial court specifically referred to the Fifth Amendment, wherein lies the Equal Protection Clause, and our Seventh Claim was couched in terms of discrimination, the hallmark of an equal protection claim.

Plaintiffs' Memorandum in Support of Motion for Injunctive Relief, filed with the original appeal, referred to "equal protection" four times and referred to the Fourteenth Amendment six times. It stated that Respondent's action "violated the rights of Plaintiffs . . . to the application of due process and equal protection of law under the Fifth Amendment, made applicable to state action by the Fourteenth Amendment."

Our Plaintiffs' Memorandum in Opposition [to Petition for Mandamus] to the Oregon Supreme Court reasserted all of the claims not reached by the trial court. It referred to equal protection twice and the Fourteenth Amendment four times. It included the same statement, quoted above, regarding "due process and equal protection of law." The Oregon Supreme Court lumped all of our claims under the U.S. Constitution together as "various constitutional challenges," not mentioning any specific amendment or clause, and summarily rejected them. App. 30-32.

Clearly, the equal protection issue was both raised and briefed at all stages below.

Respectfully submitted,

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